

1 IN THE UNITED STATES DISTRICT COURT FOR THE  
2 EASTERN DISTRICT OF VIRGINIA  
3 Alexandria Division

4 ROBERT DONNERT, et al., )  
5 v. ) Plaintiffs, )  
6 FELD ENTERTAINMENT, INCORPORATED, ) CIVIL ACTION  
7 ) Defendant. )  
8 \_\_\_\_\_)

9 REPORTER'S TRANSCRIPT

10 Volume 3

11 Thursday, November 14, 2013

12 ---

13 BEFORE: THE HONORABLE T.S. ELLIS, III  
14 Presiding

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6 (Court called to order at 9:41 a.m.)

7 THE COURT: All right. This is Robert  
8 Donnert, et al. against Feld Entertainment, doing  
9 business as Ringling Bros. And the record will reflect  
10 that counsel and the parties are present, are prepared  
11 to proceed.

12 What we're going to do is we're going to  
13 take first this last witness. Following that, I'll hear  
14 any argument on Rule 50. And then we'll proceed to a  
15 hearing on the instructions. And if appropriate, if I  
16 deny Rule 50, then we'll proceed to closing arguments  
17 and final instructions. So you will know what the final  
18 instructions are before you make your closing arguments  
19 to the jury.

20 In essence, the order is, first of all, the  
21 witness, then the Rule 50 argument, then the  
22 instructions, and then closing arguments and final  
23 instructions to the jury.

24 All right. You may bring the jury in.

25 ATTORNEY PORTER: I had one small issue that

1           dealt with exhibits. I don't know if you want to do  
2           this with or without the jury, just two that we  
3           inadvertently forgot to move in yesterday I wanted to  
4           move in.

5                         THE COURT: Well, your case isn't over.

6                         ATTORNEY PORTER: No, sir. I just didn't  
7           know if you wanted to do it first.

8                         THE COURT: No. Let's get the witness done.

9                         Have you told Mr. Pierce about those two?

10                        ATTORNEY PORTER: We've talked about them.  
11           I just didn't move them in. They were played and they  
12           were used. I just never asked you to move them.

13                        (Jury impaneled at 9:43 a.m.)

14                        THE COURT: All right. You may be seated.

15                        Good morning, ladies and gentlemen. Again,  
16           let me confirm that you were all able to follow the  
17           Court's instructions to refrain from discussing the  
18           matter.

19                        Good.

20                        All right. This morning, we're going to  
21           here a final witness. And then I will tell you how  
22           we'll proceed after that. But we'll begin with the  
23           taking of the roll. Even though I can tell all of you  
24           are here, we will do it for the purposes of the record.

25                        (Roll call.)

1                   THE COURT: All right. Mr. Porter, you may  
2 call your final witness.

3                   ATTORNEY PORTER: Robert Stipka.

4                   THE COURT: Now, let me -- as he's coming  
5 forward, let me tell the jury that we're going to be  
6 using an interpreter here because this witness is not  
7 fluent in English. And if you have any difficulty  
8 following it, I want you to hold up your hand or stop so  
9 that I can take steps to ensure that you're able to  
10 follow everything. We'll have an interpreter, and I'm  
11 going to have the interpreter sworn again this morning  
12 in front of you.

13                  All right. Come forward, please.

14                  Now, to begin with, Ms. Owensova, good  
15 morning.

16                  THE INTERPRETER: Good morning.

17                  THE COURT: Let's have the deputy clerk  
18 administer the oath of the interpreter to you.

19                  (Interpreter sworn by clerk.)

20                  THE COURT: And Ms. Owensova, I'm correct  
21 that you are an experienced interpreter in English and  
22 Czech.

23                  THE INTERPRETER: Yes, your Honor, you are  
24 correct.

25                  THE COURT: Now, if you'd step aside and let

1 the witness come right next to you. You need to be next  
2 to him. We'll administer the oath to the witness.

**3** (Witness sworn.)

**4** THE COURT: We have the -- let's give  
**5** Ms. Owensova the microphone.

6 You may not hear the witness, but that's not  
7 as important as hearing what the interpreter says.

**8** All right. Mr. Porter, you may proceed.

**9** ATTORNEY PORTER: Thank you, sir.

10 DIRECT EXAMINATION

**11** BY ATTORNEY PORTER:

**12** Q. Good morning.

**13** Will you introduce yourself to the jury,  
**14** please.

**15** A. Good morning. My name is Robert Stipka.

**16** Q. What is your occupation, your job?

17 A. I am a horse trainer. I perform -- live perform  
18 with horses in shows, and I am the head of the horse  
19 department.

**20** Q. Where are you employed?

**21**      **A.**      Feld Entertainment.

**22** Q. So you're head of the horse department at Feld?

**23** A. Yes, and the Ringling Bros. Circus.

**24** Q. Do you work on a particular unit of the Ringling Bros. Circus?

1       **A.**     Yes. The red unit.

2       **Q.**     How long have you been employed by Feld?

3       **A.**     Since February 2012.

4       **Q.**     You train horses for Ringling?

5       **A.**     Yes.

6       **Q.**     Do you present acts in the circus for Ringling?

7       **A.**     Yes.

8       **Q.**     What acts do you present in the circus?

9       **A.**     Liberty horse act.

10      **Q.**     Could you just tell the jury briefly what a  
11      liberty horse act is.

12      **A.**     The horse trainer takes a certain number of horses  
13      and performs a certain number of tricks, and there is  
14      absolutely no physical contact between the trainer and  
15      the horse.

16      **Q.**     Is the training all done by voice command or  
17      signals?

18      **A.**     Yes.

19      **Q.**     Now, the process of learning to perform and do  
20      tricks in the circus, is that a skill that you learn in  
21      school?

22      **A.**     No.

23      **Q.**     Are you aware of any school in the world that  
24      teaches people how to become horse trainers for circus  
25      animals?

1       **A.**     No.

2       **Q.**     How, in your experience, do people learn these  
3              types of skills?

4       **A.**     In circus, it's usually passed over from  
5              generation to generation, from grandfather to father and  
6              father to son.

7       **Q.**     How long have you been involved in the circus  
8              industry?

9       **A.**     My whole life.

10      **Q.**     Do you come from a circus family?

11      **A.**     Yes. I am the seventh generation.

12      **Q.**     Does your family have a history of training horses  
13              for circus -- circuses?

14      **A.**     Yes, we do.

15      **Q.**     From whom did you learn to become a horse trainer?

16      **A.**     My grandfather and my father.

17      **Q.**     Can you give us just a general sense of your  
18              father and your grandfather's background in training  
19              horses.

20      **A.**     Yes, sir. It was actually the same from  
21              generation to generation. My grandfather learned from  
22              his father. And for his whole life, my grandfather was  
23              a government employee.

24      **Q.**     Does that mean your grandfather worked for a  
25              State-owned circus?

1       **A.**     Yes.

2       **Q.**     Did you work with your father and your grandfather  
3                  in some of these jobs that he worked on?

4       **A.**     I only worked with my father.

5       **Q.**     In which circus productions did you work on with  
6                  your father?

7       **A.**     I worked with my father in the Czech National  
8                  Circus. That's when I was a little boy. Then when I  
9                  grew up, I worked with my father in the Hungarian  
10                 National Circus. Then I also helped my father to  
11                 provide private lessons for horses and trained private  
12                 horses.

13      **Q.**     When you worked with your father on these  
14                 assignments you just talked about, did your father pay  
15                 you for that?

16      **A.**     Yes, he paid me.

17      **Q.**     So who had the contracts in that situation, you or  
18                 your father?

19      **A.**     When I worked with my father, it was my father who  
20                 had the contract.

21      **Q.**     As well as learning from your father, have you had  
22                 the opportunity to discuss horse training and horse  
23                 training specifically in the circus environment with  
24                 other people who do that type of work?

25      **A.**     Yes. I do have a number of friends in Europe who

1       are experts in their areas, and we often discuss  
2       problems and issues that happen during training.

3       **Q.**      Does part of the process of you becoming a horse  
4       trainer come from discussions with your peers and  
5       colleagues?

6       **A.**      Yes, it can be stated that way.

7       **Q.**      Where did most of your training take place,  
8       meaning what country or continent?

9       **A.**      Mostly at home in Europe.

10      **Q.**      Do you hold any certificates or license --  
11      licenses from the Czech Republic?

12      **A.**      Yes. I do have a horse transport license, and I  
13      have a certificate for horse nourishment and physiology.

14      **Q.**      I think I neglected to ask this earlier.

15                  What's your home country?

16      **A.**      Czech Republic.

17      **Q.**      And how would are you?

18      **A.**      I'm 29 years old.

19      **Q.**      How old were you when you presented your first act  
20      in the Czech Republic?

21      **A.**      I was 12 years old.

22      **Q.**      Have you been involved in presenting and training  
23      horses since that time?

24      **A.**      Yes.

25      **Q.**      Have you worked for circuses other than Ringling?

1       A.     Yes.

2       Q.     What other circuses have you worked for?

3                   THE COURT: You --

4                   Go ahead. I'm sorry.

5                   THE WITNESS: I worked in the Czech National  
6                   Circus with my father, then I worked in the Hungarian  
7                   National Circus together with my father and then later  
8                   on my own. I also worked in the Coronas Circus and in  
9                   the Louis Knie Circus.

10                  THE COURT: You indicated that you had held  
11                  two certificates from the Czech Government in horse  
12                  transport and horse physiology and that sort of thing.

13                  Does the Czech Government issue any  
14                  certificates for horse training or circus performances?

15                  THE WITNESS: No.

16                  THE COURT: Next question.

17                  BY ATTORNEY PORTER:

18        Q.     Do you hold all the certificates that relate to  
19                  horse training that the Czech Republic offers?

20        A.     The Czech Republic does not offer any certificates  
21                  for horse training for circus environment.

22        Q.     Have you won any awards for training horses?

23        A.     Yes. I was a member of a group that won the  
24                  highest award, the Golden Clown, in Monte Carlo, and  
25                  that group performed horseback acrobatics.

1       Q.     That was an award that you won as part of a group?

2     Is that what I understand you to have said?

3       A.     Yes.

4       Q.     Have you been involving in training horses for  
5            entertainment events other than circuses?

6       A.     Yes. We did train our private horses for several  
7            movies.

8       Q.     Have you ever taught other people how to train  
9            horses?

10      A.     Yes.

11      Q.     How many horses do you think you've trained over  
12           the course of your career?

13      A.     About 50.

14      Q.     Does any part of that training involve acclimating  
15           a horse to a circus environment?

16      A.     Yes, definitely.

17      Q.     Mr. Stipka today, I'm going to ask you your  
18           opinion on a number of topics.

19                   Of the opinions I ask you, do you hold them  
20           to a reasonable degree of professional certainty?

21      A.     Yes.

22                   THE COURT: Now, at this point, ladies and  
23           gentlemen, ordinarily witnesses are not permitted to  
24           offer their opinions as to matters. However, an  
25           exception to that is persons who by dint of their

1           experience or training have specialized knowledge in a  
2           particular area. Those persons are permitted to offer  
3           their opinions on certain matters.

4                         However, the extent to which you accept  
5           their opinions and the extent to which you accept the  
6           witness as an expert in those areas are matters left  
7           entirely to you. All I'm doing is allowing him to offer  
8           his opinions.

9                         Yes.

10                  ATTORNEY PIERCE: Your Honor, I believe it  
11           would be appropriate for me to renew my objection from  
12           last night.

13                  THE COURT: Yes, under Daubert. And I ruled  
14           on that.

15                         All right. Let's proceed.

16                  Now, if you ask him to give opinions on the  
17           basis of facts, you need to set out those facts.

18                  ATTORNEY PORTER: Yes, sir.

19                  THE COURT: All right. Proceed.

20                  BY ATTORNEY PORTER:

21                  Q. Prior to this case, were you aware of the Donnert  
22           family?

23                  A. I knew the family, but I don't know specifically  
24           these gentlemen.

25                  THE COURT: All right. Before -- let me ask

1 so that it's clear.

2 Well, you can establish. He doesn't know --  
3 he was not involved in the facts of this case.

4 ATTORNEY PORTER: That's what I was going to  
5 ask him next, yes, sir.

6 THE COURT: He was not personally present or  
7 involved in the facts. And the questions you're going  
8 to ask will be hypotheticals based on facts.

9 ATTORNEY PORTER: Yes, sir.

10 THE COURT: All right. Proceed.

11 BY ATTORNEY PORTER:

12 Q. You don't have any personal knowledge of the facts  
13 in this case; correct?

14 THE COURT: Do you have any personal  
15 knowledge?

16 BY ATTORNEY PORTER:

17 Q. Do you have any personal knowledge of the facts in  
18 this case?

19 A. No.

20 Q. Were you employed by Feld in 2010 and 2011?

21 A. No.

22 Q. Generally, if you could, describe for the jury the  
23 facts upon which the opinions you're going to give today  
24 are based.

25 THE COURT: You state the facts, and he

**1** opines on the facts. You set the hypothetical.

**2** ATTORNEY PORTER: Okay.

**3** BY ATTORNEY PORTER:

4 Q. Mr. Stipka, I want to give you a series of facts  
5 upon which I ask you to base your opinions here today.  
6 I want you to assume that the Donnerts were hired by the  
7 circus and they were to perform two acts, a juggling act  
8 and a comedy act. The issue in this case has to do with  
9 the comedy act and Cornbread, the horse Cornbread.

**10** THE COURT: Just a moment.

11 THE INTERPRETER: That was too fast. Can  
12 you please go back to the brothers were hired.

13 ATTORNEY PORTER: Yes, ma'am.

**14** BY ATTORNEY PORTER:

15 Q. The Donnerts were hired by the circus, Ringling  
16 Bros., to perform two acts, a juggling and a comedy act.  
17 The hypotheticals I'm going to ask you about today  
18 relate to the comedy act. The Donnerts were on one unit  
19 of the circus, then they were transferred to the red  
20 unit. They went to winter quarters with the red unit.  
21 The original show order had the comedy horse doing a  
22 series of passes throughout the show. And in Part 2 of  
23 the show, Act 2 of the show, one of the passes had the  
24 comedy horse going by a tiger cage and then performing.  
25 And then the heart of the act was performed at another

1 time.

2 And then the order of the show was changed  
3 such that the pass that came after the tiger act was  
4 combined with the body of the act and performed  
5 sequentially. The horse Cornbread had trouble laying  
6 down towards the end of the routine. And Cornbread  
7 started to have trouble lying down after the order of  
8 the show had been changed.

9 Do you understand those facts that I've  
10 described to you?

11 A. Yes.

12 THE COURT: You want To also ask him whether  
13 he's seen --

14 ATTORNEY PORTER: That was my next question.

15 THE COURT: All right. Go on.

16 BY ATTORNEY PORTER:

17 Q. And also, in forming your opinions that you'll  
18 give today, have you seen videos of performances that  
19 Cornbread did during winter quarters in December of  
20 2010?

21 A. Yes.

22 Q. Apart from lying down at the end of the  
23 performance, in your opinion did Cornbread have any  
24 other troubles performing the act?

25 ATTORNEY PIERCE: Objection; foundation,

1 your Honor.

2 THE COURT: Overruled.

3 THE WITNESS: No.

4 BY ATTORNEY PORTER:

5 Q. Do you know how long the comedy act ran?

6 A. If I recall correctly, about six minutes.

7 Q. And do you recall when the horse and the comedy  
8 routine actually did the trick where it laid down on the  
9 ground?

10 A. Yes.

11 Q. Now, this factual background that we've talked  
12 today -- talked about this morning, where did you learn  
13 that?

14 A. From Mr. Porter.

15 Q. From me?

16 A. Yes.

17 Q. Okay. If you will, if you could just explain to  
18 the jury, what's the general process in training a horse  
19 to perform in a circus?

20 A. At first, you need to train the horse to know the  
21 act, to master the performance. And once the horse  
22 knows how to do that, you start getting him used to all  
23 the environmental effects that he will be exposed to in  
24 a circus. That means you start with music. Then when  
25 the horse is comfortable, you add lights and other

1 effects. And so it's a gradual process of getting the  
2 horse used to the circus environment.

3 Q. So the first part is -- do I understand that the  
4 first part is technically teaching the horse how to do  
5 the trick or the performance that it's going to give?

6 A. Yes, that's the first part.

7 Q. And then the second part -- is the second part  
8 acclimating the horse to the circus environment?

9 A. Yes.

10 Q. Now, once a horse learns a trick and becomes  
11 acclimated to a circus environment, is the training  
12 over?

13 A. No. It's the same as with athletes. Athletes  
14 have to train for their whole life, and the same applies  
15 for horses. They need to be trained permanently.

16 Q. The training you've just described, is that the  
17 training that goes into training a new horse for a  
18 circus environment?

19 A. Yes.

20 Q. Do you understand -- do you know whether or not  
21 Cornbread had any prior experience performing in a  
22 circus before he came to Feld?

23 A. Yes, I do know.

24 Q. What do you know?

25 A. I know that Cornbread performed in a circus for

1 several years with his previous owner.

2 Q. Now, in your opinion, is it common for a horse who  
3 performs in a circus to get distracted or nervous from  
4 the circus environment?

5 A. Yes, it happens.

6 Q. What types of things in a circus environment can  
7 make a horse nervous or distracted?

8 A. It is a number of factors. Generally, the same  
9 that apply to acclimatization of horse. It can be music  
10 or lights or effects or it may be a human error of  
11 somebody who did something differently than the horse is  
12 used to or it can be even little battery lights that the  
13 audience has.

14 BY ATTORNEY PORTER:

15 Q. When an issue such as a distraction or nervousness  
16 arises, how is something like that addressed by a circus  
17 trainer?

18 A. Repeated training, repeated performance, and also  
19 the trainer tried to save the situation during the  
20 performance itself when it happened.

21 Q. The plaintiffs, the Donnerts, have taken the  
22 position in this case that Cornbread stopped performing  
23 because he was scared from the sound of a tiger cage  
24 that was being taken apart and from the scent of tigers.  
25 They also take the position that the failure to perform

1 had to deal with the change in the show order.

2                   Based on the facts of this case as you  
3 understand them to be and the videos that you have  
4 watched, do you agree with the plaintiffs' conclusions?

5         **A.** I disagree.

6         **Q.** In your opinion, do you think that the fact that a  
7 circus horse may become nervous from the sound of a  
8 tiger cage strike or any other sound is a problem that  
9 can't be solved?

10       **A.** Yes, it definitely can be solved.

11       **Q.** What steps can be taken to solve a problem of that  
12 type?

13       **A.** It has to be solved by repeated training with the  
14 same disturbance that happened during the performance.  
15 It means you have to train the horse and to produce the  
16 same tiger cage noises and try to calm to the horse and  
17 try to explain to the horse that it's no problem.

18       **Q.** What if the stage crew could be instructed to take  
19 the tiger cage down in a quieter fashion? In your  
20 opinion, would that help the situation?

21       **A.** It could be probably tried. But if the horse is  
22 scared of the engine noise, because the cage is put up  
23 by an engine, then it still has to be trained with the  
24 horse and the engine sound.

25       **Q.** Is that an issue that, in your opinion, can be

1 solved as well?

2 A. Yes, definitely.

3 Q. Based on the facts, as you understand them, and  
4 the videos that you have observed, in your opinion, did  
5 the sound made from the tiger cage strike cause  
6 Cornbread to become nervous or have any impact on his  
7 performance?

8 ATTORNEY PIERCE: Objection.

9 THE COURT: What's the objection?

10 Stand when you make an objection. Yes,  
11 Mr. Pierce?

12 ATTORNEY PIERCE: All he knows about the  
13 case is what he was told by Mr. Porter and some videos  
14 that you can't see anything on.

15 THE COURT: All right. I'll overrule the  
16 objection, but you can certainly bring out that he knows  
17 what this sounds like. He's in the red --

18 Go ahead.

19 ATTORNEY PORTER: Right.

20 BY ATTORNEY PORTER:

21 Q. Sir, do you perform on the red unit?

22 A. Yes.

23 Q. Are you familiar with the tiger cage setup on the  
24 red unit?

25 A. Yes.

1       **Q.**     Have you been around it when it's been either set  
2                  up or taken down?

3       **A.**     Yes. I was there several times.

4       **Q.**     Are you familiar with the sound -- the sounds that  
5                  are made when the tiger cage is set up and taken down?

6       **A.**     Yes.

7       **Q.**     Is the opinion that you just gave based, in part,  
8                  on your knowledge of the sound that a tiger cage makes  
9                  when it's taken apart?

10      **A.**     Yes.

11      **Q.**     Based on your review of the rehearsal videos that  
12               you've seen, did you observe Cornbread exhibit any  
13               behavior on those videos that suggests to you, in your  
14               opinion, that safety was ever an issue as part of that  
15               routine?

16      **A.**     No.

17      **Q.**     Just talking about the videos for a moment, how  
18               many videos of the performances have you seen?

19      **A.**     I think it was four.

20      **Q.**     In the videos that you saw, can you see the tiger  
21               cage going up and down?

22      **A.**     Yes.

23      **Q.**     Can you see the horse performing?

24      **A.**     Yes.

25      **Q.**     Where does the comedy act take place in relation

1 to where the tiger cage is being taken down?

2 **A.** The comedy horse act is performed in Ring No. 1,  
3 and the tiger cage is in Ring No. 2.

4 **Q.** Let's talk just a bit about the scent of the  
5 tigers and on the same topic with the videos.

6 In the videos that you watched, where are  
7 the tigers when Cornbread begins to perform both the  
8 Donnert pass and the comedy act?

9 **A.** They were in transport carts, and they were being  
10 taken out.

11 **Q.** Being taken out as -- were the tiger cages being  
12 taken out as Cornbread was entering the ring for the  
13 first time?

14 **A.** Yes.

15 **Q.** Were the tigers completely out of the arena before  
16 the Donnert pass started?

17 **A.** They were in the transport carts, and they were  
18 being taken out. They were not totally out.

19 **Q.** That's as the horse enters the arena?

20 **A.** Yes.

21 **Q.** The Donnerts have taken the position in this case  
22 that a comedy act shouldn't follow a tiger act and that  
23 to do so is unsafe.

24 Do you agree with that conclusion?

25 **A.** No.

1       **Q.**     In your opinion, is there anything inherently  
2                  unsafe about a horse act following a tiger act?

3       **A.**     No.

4       **Q.**     In your experience, are there any industry  
5                  standards that say a horse act should never follow a  
6                  tiger act?

7       **A.**     No.

8       **Q.**     Are you aware of any instances when horses and  
9                  tigers actually perform in the same ring?

10      **A.**     Yes, definitely. In Europe, it's a matter of  
11                  course because we only have one ring.

12      **Q.**     And have you actually seen tigers and horses in  
13                  the same ring? Are you aware -- let me strike that and  
14                  ask one question instead of a compound one.

15                  Are you aware of situations where tigers and  
16                  horses have performed together in the same ring?

17      **A.**     Yes.

18      **Q.**     But that's not what was happening in this case; is  
19                  that right?

20      **A.**     That's correct.

21      **Q.**     In your expert opinion, is training a horse to  
22                  overcome a fear of a scent of a tiger any different than  
23                  training a horse to overcome any other issue that a  
24                  horse may have in a circus?

25      **A.**     No, it's no difference.

1       Q.     Do you have any experience training horses in the  
2     same ring where tigers have been previously?

3       A.     Yes.

4       Q.     Have you ever trained a horse in the same ring  
5     right after tigers have left?

6       A.     Yes.

7       Q.     Have you experienced any problems with horses  
8     training in that same ring after tigers have left the  
9     ring?

10      A.     No.

11      Q.     Do you know if in Cornbread's pass he had any  
12     experience performing in the same ring that another cat  
13     act had performed?

14      A.     Yes. In the gold unit.

15      Q.     What other cat, if you know, did Cornbread perform  
16     not at the same time, but either after or before?

17                   ATTORNEY PIERCE: Objection.

18                   THE COURT: Yes. Just a moment.

19                   ATTORNEY PIERCE: Given that all he knows  
20     about these prior events comes from counsel, counsel is  
21     now testifying through his own witnesses. I object to  
22     that.

23                   THE COURT: I don't -- I'm not I understand  
24     what -- tell me what you mean, Mr. Pierce.

25                   Do you need to come to the bench?

1 ATTORNEY PIERCE: I don't think so, your  
2 Honor.

3 THE COURT: All right. Go on.

4 ATTORNEY PIERCE: Mr. Stipka has indicated  
5 all he knows about this case is what he was told by  
6 Mr. Porter and watching the videos. Obviously, any  
7 testimony he give now is going to come from Mr. Porter.  
8 So Mr. Porter is now asking his witness to tell him what  
9 he was told by Mr. Porter.

10 THE COURT: No, I don't think that's what  
11 you were doing, Mr. Porter.

12 Did you tell him about cats and Cornbread?

13 ATTORNEY PORTER: I think that he does  
14 know -- maybe the point is a fair one, that he does know  
15 from me that Cornbread performed on another Ringling  
16 circus unit in the same ring as -- not at the same time,  
17 as another cat. So perhaps I can ask it in another way.

18 THE COURT: Then that would be hearsay in  
19 that you can -- but you don't have other evidence in the  
20 record of that, so you'll have to move on.

21 ATTORNEY PORTER: Yes. That's fine. I was  
22 going to ask it as a predicate to his factual  
23 conclusions in the case.

24 THE COURT: All right. Go on.

25 BY ATTORNEY PORTER:

1           Q.     In the facts that you're aware of that form your  
2     opinions about Cornbread and how Cornbread performed in  
3     the red unit, did you become aware of instances in which  
4     Cornbread performed in the same ring, not at the same  
5     time, as another big cat?

6                         ATTORNEY PIERCE: Same objection.

7                         THE COURT: I think it is, Mr. Porter,  
8     because that evidence isn't otherwise in the record  
9     except through you.

10                  ATTORNEY PORTER: That's fine. I'll move  
11     on.

12                  THE COURT: So I'll sustain the objection.  
13     Let's move on.

14                  BY ATTORNEY PORTER:

15           Q.     Now, in this case, was Cornbread performing in the  
16     same ring as the tiger act?

17           A.     No.

18           Q.     Was Cornbread performing at the same time as the  
19     tiger act?

20           A.     No.

21           Q.     In the videos that you watched, in your opinion,  
22     did Cornbread show any signs of fear as the horse came  
23     into the ring by the tiger cage transports?

24                  ATTORNEY PIERCE: Objection; foundation.

25                  THE COURT: Overruled.

1 THE WITNESS: No, I did not observe any  
2 fear.

**3** BY ATTORNEY PORTER:

**4** Q. To the extent that Cornbread or another horse has  
**5** a fear of tigers, is that an issue that, in your  
**6** opinion, can be addressed by a trainer?

7 THE INTERPRETER: Your Honor, may I have  
8 this question repeated, please.

**9** THE COURT: Yes. Repeat it, Mr. Porter.

**10** ATTORNEY PORTER: Yes, sir.

**11** BY ATTORNEY PORTER:

**12** Q. To the extent Cornbread or some other horse  
**13** displays some fear of tigers, is that the type of issue  
**14** that can be addressed by a trainer?

**15** A. Yes, definitely.

16 Q. How could an issue like that be addressed?

17 A. As I explained before, training is the only way.  
18 I would solve the situation by taking the horse in the  
19 vicinity of the tigers and let him smell the tigers and  
20 see that nothing is going on and that everything is  
21 okay.

**22** Q. In your expert opinion, can a horse act  
**23** successfully follow a tiger act?

24 A. Yes.

25 Q. We've talked about the issue that Cornbread had,

1 which is that it had trouble lying down at the end of  
2 the act.

3 In your opinion, if a horse won't lie down,  
4 does that mean there's a safety issue?

5 A. No.

6 Q. In your opinion, if a horse won't lie down, does  
7 that mean that they're scared or afraid?

8 A. Yes, the horse may be afraid.

9 Q. What -- could there be other reasons why a horse  
10 won't lie down or has trouble lying down?

11 A. It could be medical reasons.

12 THE COURT: Well, are you going to cover --  
13 I think the horse would lay down, but it would get up  
14 prematurely.

15 Is that what the testimony was?

16 ATTORNEY PORTER: I think it was -- my  
17 recollection --

18 THE COURT: You may ask about both, then.

19 ATTORNEY PORTER: Yes.

20 BY ATTORNEY PORTER:

21 Q. If the horse either won't lie down or pops up when  
22 it's down, does that necessarily mean that the horse is  
23 afraid?

24 A. No.

25 Q. Could there be other reasons why a horse either

1           won't lie down or pops up after it's been down?

2       **A.**     Yeah. It can be just reasons on the side of the  
3           horse. He just may not want to lie down.

4       **Q.**     Do you mean that a horse could be stubborn or  
5           something like that?

6       **A.**     Yes, definitely.

7       **Q.**     Is that something that happens with animals?

8       **A.**     Yes, on an everyday basis.

9       **Q.**     What about the fact that a horse hasn't performed  
10          in a period of time? Could that, in your opinion,  
11          create an issue where a horse has trouble either lying  
12          down or popping up after it's been down?

13      **A.**     Yes, definitely.

14      **Q.**     In this case, Cornbread was injured in September  
15          of 2010 and didn't rehearse or train again until winter  
16          quarters in November or December.

17                   Could a lag of time like that, in your  
18          opinion, cause a horse to have trouble performing an  
19          element of his routine?

20      **A.**     Yes.

21      **Q.**     What about the fact that a horse has not performed  
22          before a live audience in a period of time?

23      **A.**     That also can be a problem.

24                   THE COURT: Can those problems be solved?

25                   THE WITNESS: Yes, definitely.

1 THE COURT: Next --

2 How?

3 THE WITNESS: Training and -- repeated  
4 training. And also during that live performance, you  
5 need to try to save the situation.

6 BY ATTORNEY PORTER:

7 Q. Is it -- let's talk about that for a moment. Is  
8 it possible for a trainer to train an animal in a live  
9 performance?

10 A. Not train, but correct.

11 Q. Is it common to have an animal perform one way in  
12 practice and a different way in a live performance?

13 A. Yes.

14 Q. In your opinion, what could be the cause for  
15 something like that?

16 A. Horses are very intelligent animals. So they  
17 know -- they can distinguish between training and live  
18 performance. So in training, they know they have more  
19 time. They can repeat the routine. But they also know  
20 that when it's live performance, they only have limited  
21 amount of time.

22 Q. What about the fact that a horse may defecate  
23 during a performance? In your opinion, does that mean  
24 that there's a safety issue?

25 A. No.

1       **Q.**     In your experience, is it common for circus  
2              animals to defecate in a performance?

3                   THE COURT: Rather than circus animals,  
4              we're only interested in horses.

5                   ATTORNEY PORTER: That's true. You're  
6              right.

7                   THE COURT: So ask your question again --

8                   ATTORNEY PORTER: Yes, sir.

9                   THE COURT: -- with just horses.

10          BY ATTORNEY PORTER:

11        **Q.**     In your experience, have you seen situations where  
12              horses defecate during a circus performance?

13        **A.**     Yes. I have the same problem.

14        **Q.**     In your opinion, do horses have instinctual fears?

15        **A.**     Yes.

16        **Q.**     What types of instinctual fears do you think  
17              horses have?

18        **A.**     As I mentioned before, all kinds of noises, loud  
19              noises or just less noises. They have instinctive fears  
20              of those.

21        **Q.**     Do they have instinctual fear of other animals as  
22              well?

23        **A.**     Yes, they can.

24        **Q.**     In your opinion, are those types of instinctual  
25              fears things that can be overcome through training?

1       A.     Yes.

2       Q.     In your expert opinion, did you see any safety  
3           issue with respect to the comedy act following the tiger  
4           act in this situation?

5       A.     No.

6       Q.     Based on what you've learned from me and what  
7           you've observed in the videotapes, what does the fact  
8           that Cornbread had trouble lying down or popped up  
9           occasionally during the end of the routine suggest to  
10          you?

11      A.     I did not see any safety issues or any anxiety in  
12           the horse. In my opinion, the horse just was stubborn,  
13           just did not want to lie down.

14      Q.     Do you think that's the type of issues that can be  
15           solved by a trainer?

16      A.     Yes.

17      Q.     In your opinion, based on what you've heard from  
18           me and seen in the videotapes, did you see anything that  
19           suggested to you that the show order should be changed?

20           ATTORNEY PIERCE: Objection.

21           THE COURT: I'll sustain that.

22           "What you've heard from me" is a bit broad.

23           ATTORNEY PORTER: I was trying to address  
24           Mr. Pierce's objection.

25           THE COURT: It doesn't matter what you were

1 trying to do.

2 ATTORNEY PORTER: I understand.

3 BY ATTORNEY PORTER:

4 Q. Do you think any of the issues that you observed  
5 Cornbread having necessitated any change in the show  
6 order?

7 A. No.

8 ATTORNEY PORTER: Thank you, Mr. Stipka.

9 Those are my questions, sir.

10 CROSS-EXAMINATION

11 BY ATTORNEY PIERCE:

12 Q. Good morning, Mr. Stipka.

13 A. Good morning.

14 Q. Now, you first started working on your own when  
15 you were 22 years old; correct?

16 A. Yes.

17 Q. That was in the Year 2007, six years ago; correct?

18 A. Yes.

19 Q. And it's only in that six-year time span that  
20 you've been actually getting contracts or work on your  
21 own; correct?

22 A. Yes.

23 Q. When you came to this country to work for  
24 Ringling, this was the first time you've actually been  
25 in the U.S.; correct?

1       **A.**     No. I was invited here before last year to see  
2                      Ringling and to know what it was all about.

3       **Q.**     Before you got hired to Ringling, you visited with  
4                      them.

5                      Is that what you're saying?

6       **A.**     Yes.

7       **Q.**     And your current employment relationship with  
8                      Ringling is a two-year long-term contract; correct?

9       **A.**     Yes.

10      **Q.**     And they --

11                    THE COURT: If it's two years, I don't  
12                      know -- what do you mean by -- how long is the contract  
13                      you have with Ringling Bros.

14                    THE WITNESS: For two years.

15                    THE COURT: So it doesn't go beyond two  
16                      years.

17                    THE WITNESS: There is an option to extend  
18                      the contract.

19                    THE COURT: Next question.

20      BY ATTORNEY PIERCE:

21      **Q.**     And that option runs out for an additional eight  
22                      years making a total of ten years of employment with  
23                      Ringling.

24      **A.**     I'm not exactly sure about the number. It may be  
25                      six or eight years.

1 Q. In your country of Czechoslovakia, there is a  
2 well-known saying that goes like this: "Whose bread I  
3 eat, his song I sing"; correct?

**4** ATTORNEY PORTER: Objection; argumentative.

**5** THE COURT: I'll permit it.

**6** THE WITNESS: Yes.

7 BY ATTORNEY PIERCE:

8 Q. And the purpose of that saying in your country is  
9 that if you work for somebody, you're going to support  
10 them; correct?

**11** | A. Yes.

**12** Q. It's also true, Mr. Stipka, that you have never  
**13** trained any horse to overcome a fear of tigers; is that  
**14** correct?

**A.** That is correct.

**16** Q. You have never trained a comedy horse; correct?

**A.** That's correct.

**18** Q. Sir, you also dropped out of formal schooling in  
**19** the 9th grade; correct?

20           A.       Yes. I completed mandatory nine years, and then I  
21           started to study at the high school. But I had to drop  
22           out after two years because I was unable to attend due  
23           to my work.

24 Q. And these certifications that you talked about  
25 getting in your home country, that was a three-week

1 course involving 120 study hours; correct?

2 A. That's correct.

3 Q. When Mr. Porter asked you just now whether there  
4 were any standards that supported one of your opinions,  
5 it's true that there are no standards whatsoever that  
6 govern horse training; correct?

7 THE COURT: You're talking about standards  
8 issued by an agency or government?

9 ATTORNEY PIERCE: Anyone. I don't think  
10 it's going to change his answer, as I understand it.

11 THE COURT: Well, we'll see. I'm not sure.

12 THE WITNESS: There are no standards.

13 THE COURT: Do you personally have standards  
14 in the work that you do?

15 THE WITNESS: Yes, definitely.

16 THE COURT: Next question.

17 BY ATTORNEY PIERCE:

18 Q. It's also true, is it not, Mr. Stipka, there's no  
19 place that you can go to like a school or a library or  
20 any other place to get authoritative answers on how to  
21 train horses.

22 A. That is correct. There is no public institution  
23 like that.

24 Q. And you talked a little bit about some time you  
25 spent at the Hungarian Circus school.

1                   It's true, is it not, that your father had  
2 held a position there, he became injured, and you took  
3 over training of his trained horses? Correct?

4         A.       That is not accurate. The situation was that my  
5 father worked for the Hungarian State Circus. I worked  
6 with him. And then there was a disagreement between him  
7 and the circus director, so my father ended his  
8 employment. And later on, I came back to the circus and  
9 I trained the horses. There were a few of those horses  
10 that I trained together with my father, but there were  
11 also many new horses that were purchased after that.

12       Q.       As you understand it, Mr. Stipka, your purpose  
13 today is to tell the jury how you personally train  
14 horses; correct?

15                   ATTORNEY PORTER: I object, your Honor. I  
16 think he's qualified.

17                   You want me to wait?

18                   THE COURT: What's your objection.

19                   ATTORNEY PORTER: He's been qualified as an  
20 expert. He's not here to talk about him personally.  
21 He's here to talk about, in his expert opinion, what he  
22 understands the standard is in the industry.

23                   THE COURT: I'll permit it. Go ahead.  
24 Overruled.

25                   THE INTERPRETER: Can that question be

1 repeated for Mr. Stipka, please.

2 THE COURT: Yes. Repeat the question.

3 BY ATTORNEY PIERCE:

4 Q. Mr. Stipka, as you understand it, your purpose  
5 today is to explain to the jury how you personally train  
6 horses.

7 A. Yes.

8 Q. So what you're doing today is telling us the  
9 Robert Stipka way of training.

10 A. Yes, as the Stipka family trained horses.

11 Q. There's a lot of other families in the horse  
12 training business, aren't there?

13 A. Yes.

14 Q. Do they all agree on every last detail?

15 A. This is a question that is really difficult to  
16 answer. They may not agree; they may agree.

17 THE COURT: Are there general rules of horse  
18 training, in your experience, that would apply to all  
19 horse trainers who are trying to train horses for a  
20 circus?

21 THE WITNESS: I would say the rules are  
22 generally the same. There are different systems.  
23 Everybody has slightly different system, but there must  
24 be a system.

25 THE COURT: Next question.

1 BY ATTORNEY PIERCE:

2 Q. Now, Mr. Stipka, you have testified as to whether  
3 there were any safety issues, and I now want to ask you  
4 some questions about that testimony.

5 You've agreed that you were not physically  
6 present at any time when Cornbread was exhibiting the  
7 changes in its behavior; correct?

8 THE COURT: I think the proper question  
9 is -- because you're testifying about changes in  
10 behavior. I think the question is, "You were not  
11 present during any of the rehearsals or performances?"

12 ATTORNEY PIERCE: I'll state that, your  
13 Honor.

14 THE COURT: Go ahead.

15 BY ATTORNEY PIERCE:

16 Q. You would agree, Mr. Stipka, that you were not  
17 present during any of the practices or rehearsals that  
18 Cornbread was having in the latter part of December  
19 2010.

20 A. That's correct, I was not present.

21 Q. And the only thing that you know is what you were  
22 told by Mr. Porter, and you say there were four of the  
23 videos that you watched; correct?

24 A. Yes.

25 Q. And which of the four videos did you watch?

1                   THE COURT: I thought he said he watched  
2 four videos.

3                   ATTORNEY PIERCE: I thought he said he  
4 watched four videos as well. I thought that was the  
5 question.

6                   THE COURT: Well, the question is which of  
7 the four videos. I thought he watched four.

8                   Is that correct?

9                   ATTORNEY PIERCE: I thought he said that as  
10 well. I was trying to get the dates of them.

11                  THE COURT: I think there might be some  
12 confusion. If someone says, "I watched four videos" and  
13 you say, "Which ones did you watch?" how do you expect  
14 him to designate which among the four?

15                  So the first question is did you watch four  
16 videos?

17                  THE WITNESS: Yes.

18                  THE COURT: And what did these video depict?

19                  THE WITNESS: The comical horse act of  
20 Cornbread.

21                  THE COURT: And were they four distinct  
22 performances?

23                  THE WITNESS: Yes.

24                  THE COURT: And do you know the dates of  
25 those?

1                   THE WITNESS: It was approximately at the  
2 beginning of December, but I do not recall exact date.

3                   THE COURT: All right. He watched four  
4 videos that were in December, and they were of the  
5 performance of Cornbread.

6                   Next question.

7 BY ATTORNEY PIERCE:

8 Q. And how many of those videos were before the order  
9 changed?

10 A. I'm not exactly sure, but I think I saw one before  
11 the change and three after the change. But I'm not a  
12 hundred percent sure about that.

13 Q. The reason why you're not sure is because you're  
14 not sure when the show order changed?

15 A. The main reason is I saw the video several months  
16 ago, so I do not exactly recall.

17 Q. And the three videos that you may have seen after  
18 the show order changed, were they all in dark so that  
19 you couldn't see the teardown of the tiger cage?

20 A. It was dark, but I did see that.

21 Q. And the floodlights that were shining on the area  
22 where Cornbread was performing, you found that you  
23 really couldn't see anything that was going on during  
24 the performance of Cornbread --

25 THE COURT: Now you're testifying and not

1 leading. You've gone from leading to testifying.

2 BY ATTORNEY PIERCE:

3 Q. Mr. Stipka, it's true, is it not, in those three  
4 videos that you may have watched after the show order  
5 changed, that you were not able to see any of the  
6 details of Cornbread's performance; correct?

7 A. Yes, the visibility was not that good.

8 THE COURT: I didn't hear the answer.

9 What was the answer?

10 THE WITNESS: The visibility was not that  
11 good.

12 THE COURT: All right. Next question.

13 BY ATTORNEY PIERCE:

14 Q. Does it bother you as an expert witness that  
15 you're relying on what you were told by Mr. Porter?

16 A. No, it does not bother me.

17 Q. Do you know who Tabayara Maluenda is?

18 A. Yes.

19 Q. You work with him on the red unit; correct?

20 A. Yes.

21 Q. You're aware that he had responsibility for animal  
22 safety at the time of this incident in December of 2010?

23 ATTORNEY PORTER: Objection. There's been  
24 no evidence of that.

25 THE COURT: Has there been, Mr. Pierce?

1 ATTORNEY PIERCE: I believe that there has,  
2 your Honor. And it's in the contract. The addendum  
3 refers to our responsibility to work under Mr. Tabayara.

4 THE COURT: This name.

5 What's the name, Mr. Pierce?

6 ATTORNEY PIERCE: Tabayara Maluenda is  
7 mentioned by name in the addendum, our Exhibit 39.

8 THE COURT: I have it in front of me.

9 What paragraph?

10 ATTORNEY PIERCE: I have to look.

11 THE COURT: It's three pages, Mr. Pierce.  
12 It can't be that difficult to direct me to where his --  
13 I see it in Paragraph 9.

14 ATTORNEY PIERCE: That's right, your Honor.

15 THE COURT: All right. That paragraph  
16 doesn't say anything about safety. It talks about  
17 training and daily husbandry; right? Isn't that what it  
18 says? Training and daily husbandry of such animal  
19 species.

20 ATTORNEY PIERCE: As directed by Tabayara.

21 THE COURT: It doesn't say anything about  
22 safety, does it?

23 ATTORNEY PIERCE: It says training.

24 THE COURT: It doesn't say anything about  
25 safety.

1                   What's the answer to my question?

2                   ATTORNEY PIERCE: It doesn't say that word  
3 expressly.

4                   THE COURT: So you put it in and you're  
5 testifying.

6                   So the objection is sustained. You may ask  
7 him a question about this person, but don't imply things  
8 because that's you introducing evidence. You had plenty  
9 of opportunity to ask other people.

10                  Let's proceed.

11                  BY ATTORNEY PIERCE:

12                  Q.       Mr. Stipka, were you aware that Mr. Maluenda had  
13 responsibilities for animal safety in December of 2010?

14                  ATTORNEY PORTER: Objection. There's been  
15 no evidence of that.

16                  THE COURT: Well, I'll let him answer.

17                  THE WITNESS: No, I'm not aware of that.

18                  THE COURT: Next question.

19                  BY ATTORNEY PIERCE:

20                  Q.       Did you make any attempt to interview anyone who  
21 had worked for the red unit at the time that this  
22 happened in December of 2010?

23                  THE COURT: At the time that what happened?

24                  ATTORNEY PIERCE: At the time of the  
25 incident involving Cornbread in December.

1 THE COURT: All right.

2 THE WITNESS: No, I did not.

3 THE COURT: Did you feel it was necessary?

4 THE WITNESS: No.

5 BY ATTORNEY PIERCE:

6 Q. Did anyone from Ringling pick up the phone and  
7 call you and ask you for your assistance in December of  
8 2010?

9 THE COURT: He wasn't employed in December  
10 of 2010. I assume he was in Czech Republic.

11 Is that right, in 2010 you were in the Czech  
12 Republic?

13 THE WITNESS: I worked with Circus Louis  
14 Knie. So no, I was not in the Czech Republic.

15 THE COURT: Where were you?

16 THE WITNESS: In Austria.

17 THE COURT: Next question.

18 BY ATTORNEY PIERCE:

19 Q. And it's also your testimony, Mr. Stipka, that  
20 Ringling didn't even know about you as an expert in  
21 December of 2010; correct?

22 THE COURT: What he would know about what  
23 Ringling knew is not within his ken. So I'll sustain an  
24 objection that should have been made. It's not -- how  
25 could he possibly know what Ringling knew?

1 ATTORNEY PIERCE: He testified to it at his  
2 deposition, your Honor.

3 ATTORNEY PORTER: I move to strike that as  
4 inaccurate.

5 THE COURT: It is stricken. I'm sure the  
6 jury has already disregarded it.

7 Let's complete this cross-examination.

8 BY ATTORNEY PIERCE:

9 Q. Mr. Stipka, is it your understanding that the only  
10 behavioral change that Cornbread exhibited in December  
11 of 2010 was his refusal to lie down?

12 A. Yes.

13 Q. And given that --

14 THE COURT: I'll point out, though, that he  
15 also answered a hypothetical that included more than  
16 that. He answered a hypothetical that included lying  
17 down and popping up.

18 So go ahead.

19 BY ATTORNEY PIERCE:

20 Q. Given that the ability to see things on the video  
21 was so flooded out by the floodlights, would you agree  
22 that you were not able to see other characteristic signs  
23 of fear that Cornbread may have been exhibiting at the  
24 time?

25 ATTORNEY PORTER: Objection; assumes that

1           they were there to see.

2           THE COURT: Overruled.

3           THE WITNESS: The visibility was not that  
4           good, as I have already stated. But the first reaction  
5           of a scared horse is to run away. And I did not see any  
6           signs of the horse trying to run away -- away from the  
7           light.

8           THE COURT: Is he finished?

9           THE WITNESS: Yes.

10          THE COURT: I believe what Mr. Pierce wants  
11          to know is could you see on the video whether his  
12          eyes -- whether the horse's eyes were wide open?

13          THE WITNESS: No, I couldn't see that on  
14          that video.

15          THE COURT: Is that a sign of fear in a  
16          horse?

17          THE WITNESS: Yes, it can be.

18          THE COURT: And were you able to see on the  
19          video the horse's tail swishing?

20          THE WITNESS: Yes, I saw that.

21          THE COURT: And is that a sign of fear in a  
22          horse?

23          THE WITNESS: I don't think it has to be a  
24          sign of a fear. Maybe some anxiety or nervousness.

25          THE COURT: Assuming that Cornbread had

1 wide-open eyes and had trouble lying down and popped up  
2 when he wasn't supposed to pop up and also had his tail  
3 swishing, assuming that these were signs of fear and  
4 anxiety, could that be overcome by training, in your  
5 opinion?

6 THE WITNESS: Yes.

7 THE COURT: Next question.

8 BY ATTORNEY PIERCE:

9 Q. The circuses that you had mentioned working for in  
10 the country (sic) of Europe have all been one-ring  
11 circuses; correct?

12 A. Yes.

13 Q. Which means that your experience does not involve  
14 in the country (sic) of Europe operating your act while  
15 there's a tear-down going right beside you; correct?

16 A. Yes, that's correct.

17 Q. And in those situations where you testified that  
18 your horses have followed tigers in the same ring,  
19 that's a situation where the tigers have come in,  
20 they've performed, they've left, and then your horses  
21 come in without a teardown in the dark; correct?

22 A. That's correct.

23 Q. And in your background and experience, you have  
24 not been involved in a circus that has had a tiger act  
25 that goes dark on one ring, it's torn down in the dark

1       while a horse act is proceeding in a ring next to it in  
2       floodlights; correct?

3       **A.**      I don't have this experience from Europe but I was  
4       in the situation here.

5                  THE COURT: In this country?

6                  THE WITNESS: Yes, in the United States.

7                  THE COURT: Next question.

8       BY ATTORNEY PIERCE:

9       **Q.**      Now, you would agree, would you not, Mr. Stipka,  
10     that each and every horse is different when it comes to  
11     the ability to train that animal?

12      **A.**      Yes.

13      **Q.**      Some are more readily frightened or excitable;  
14     correct?

15      **A.**      Correct.

16      **Q.**      And the training needs of those horses will  
17     correspondingly vary from one horse to another; correct?

18      **A.**      That's correct.

19      **Q.**      Every horse has fears; correct?

20      **A.**      May have fears, yes.

21      **Q.**      Fear is an instinct; correct?

22      **A.**      Fear is an instinct. But if your horse trusts  
23     you, then this fear is not so intensive.

24      **Q.**      Horses have instinctual fears of tigers; correct?

25      **A.**      Yes.

**1** Q. Horses have instinctual fears of loud noises  
**2** coming out of the darkness; correct?

3 A. Yes.

**4** Q. Horses react differently when faced with a fear;  
**5** correct?

**6**      A.      Yes.

7 Q. Some horses when afraid will take off running;  
8 correct?

**9**      A.      Yes.

**10** Q. Some of them will rear up or trample on humans  
**11** that might be near them when they're afraid; correct?

**A.** I never saw the rearing up case. Usually, they want to run away.

14 Q. And you yourself have personally been involved in  
15 somewhere between 10 and 20 personal injuries to your  
16 body that you've sustained as a result of interacting  
17 with your own animals; correct?

**18** A. Yes, light injuries.

**19** THE COURT: What kind of injuries?

20 THE WITNESS: Light injuries.

21 THE COURT: What do you mean by "light  
22 injuries"?

23 THE WITNESS: Not big injuries. Small  
24 injuries. I've never had a broken hand or broken leg.  
25 I never had to go to a hospital. I sometimes had a

1 bruise or so.

2 THE COURT: Next question.

3 BY ATTORNEY PIERCE:

4 Q. And those 10 to 20 personal injuries that you just  
5 described were sustained because your animal was  
6 frightened; correct?

7 A. No.

8 THE COURT: How much more do you have?

9 ATTORNEY PIERCE: Maybe 15.

10 THE COURT: How long?

11 ATTORNEY PIERCE: Maybe 15 minutes, your  
12 Honor.

13 THE COURT: All right. Let's get on with  
14 it.

15 BY ATTORNEY PIERCE:

16 Q. And you would also agree, Mr. Stipka, that even  
17 thoroughly trained horses can still be frightened;  
18 correct?

19 A. Yes, that may happen.

20 Q. It can take years to train one horse to overcome  
21 particular fears; correct?

22 A. I wouldn't say years, but it can take some time.

23 Q. You personally have been working with a horse for  
24 how many months now that was afraid of having acrobats,  
25 human beings, over the top of it?

1           A.       Yes.

2           Q.       How many months? I took your deposition in July.

3           It was eight months.

4                   Are you still working with that same horse?

5           A.       I still work -- I'm still working with that horse.

6                   But the horse has really no effect on the performance.

7                   The problem was just with the entry of the horse in the  
8                   ring. During the performance, he's fine.

9                   THE COURT: So the horse now performs?

10                  THE WITNESS: Yes, now performs and has  
11                   always been performing fine.

12                  THE COURT: Next question.

13                  BY ATTORNEY PIERCE:

14                  Q.       Sometimes horses surprise you as to how much  
15                   training they are going to take; correct?

16                  A.       Yes.

17                  Q.       And sometimes it's not possible for you to predict  
18                   with accuracy how long training is going to take;  
19                   correct?

20                  A.       I can't tell an approximate time how long the  
21                   training will take. I cannot tell the exact time, but  
22                   definitely approximate time.

23                  Q.       Mr. Stipka, let me ask you this hypothetical: If  
24                   you had a long-term contract with an employer and the  
25                   employer said, "I'm giving you two months to train this

1 horse to overcome a fear or you will lose your  
2 contract," how would you react to that?

3 THE COURT: He's not an expert on react to  
4 that. That's not an appropriate question.

5 ATTORNEY PIERCE: He's been testifying  
6 throughout --

7 THE COURT: If you want to ask him whether  
8 two months would be long enough to give him a  
9 hypothetical about this situation and ask him if that  
10 would be long enough, you may ask him that. Not how  
11 would he react to that. That's asking for an opinion  
12 about how the plaintiffs reacted to it. He's not an  
13 expert on human reaction.

14 ATTORNEY PIERCE: He's been testifying  
15 throughout --

16 THE COURT: I told you what you may do. So  
17 the question you've asked and the form you've asked it  
18 is inappropriate. But you certainly may ask a question  
19 about -- give him a hypothetical and ask him whether  
20 that's a reasonable time, if that's your question.

21 ATTORNEY PIERCE: I will try and phrase it  
22 in that way, your Honor.

23 BY ATTORNEY PIERCE:

24 Q. Mr. Stipka, let me ask you hypothetically, if you  
25 had a long-term contract with an employer and the

1 employer insisted that you be able to train out a fear  
2 in two months and the failure to do which would cost you  
3 your contract, would that be a reasonable requirement on  
4 you?

5 ATTORNEY PORTER: Objection.

6 THE COURT: That's not a -- you could ask  
7 him whether it could be trained in two months, but not  
8 whether the two months is reasonable. That's for the  
9 jury, if the jury believes that there's a two-month  
10 restriction. So you may ask him whether, given the  
11 facts, whatever hypothetical you want to give him,  
12 provided the facts are in this case, whether two months  
13 would be an adequate amount of time in which to train  
14 the horse.

15 BY ATTORNEY PIERCE:

16 Q. Mr. Stipka, assume, please, that you have a  
17 long-term contract with an employer, that the employer  
18 requires you to train a horse to overcome a fear within  
19 two months, would you be able to guarantee performance  
20 of that successful outcome in two months?

21 A. I would definitely try to correct the situation  
22 with the horse, but I cannot provide a guarantee for  
23 that.

24 Q. And, in fact, if a requirement of that type was  
25 placed on you, you would walk away, wouldn't you?

1 ATTORNEY PORTER: Objection.

2 THE COURT: I'll sustain it.

3 BY ATTORNEY PIERCE:

4 Q. Is there any way that you could guarantee --

5 THE COURT: He's asked and answered. He  
6 said he couldn't guarantee.

7 Am I incorrect in that regard?

8 Read back his answer, Mr. Rodriguez, to the  
9 previous -- not the previous question, but the one  
10 before it.

11 (Record read.)

12 THE COURT: There you have it. Let's not  
13 waste time with the same question.

14 BY ATTORNEY PIERCE:

15 Q. Are you aware of any contract that has ever been  
16 issued to a circus performer that requires performers to  
17 undertake training in a specified time limit?

18 ATTORNEY PORTER: Objection.

19 THE COURT: Sustained.

20 BY ATTORNEY PIERCE:

21 Q. It's true, is it not, Mr. Stipka, that you've  
22 never been advised that there is evidence in this case  
23 that Ringling imposed a time deadline within which the  
24 Donnerts had to train their animals; correct?

25 ATTORNEY PORTER: Objection.

**1** THE COURT: I'll sustain that.

You may ask him whether he knew that there was a two-month deadline. Now, there's a dispute of fact about that. That's for the jury to decide. But you may ask him whether he was ever told there was a two-month deadline to train the horse. But he's already given you his answers how they relate to his opinion. Whether he was told that or not is irrelevant, but you may ask it if you wish.

**10** BY ATTORNEY PIERCE:

11 Q. Mr. Stipka, were you told at any time that the  
12 Donnerts had a two-month deadline placed on them within  
13 which they had to complete training related to  
14 Cornbread?

15 ATTORNEY PORTER: I'm going to object to the  
16 form of the question, your Honor, because the way that  
17 it was phrased suggests that that was a fact versus a  
18 potential theory.

19 THE COURT: I'll overrule the objection. He  
20 can answer whether he was ever told that.

THE WITNESS: Can I have the question repeated, please.

23 THE COURT: Were you ever told that Ringling  
24 Bros. -- let me put it this way: Were you ever told  
25 that the Donnerts contend that they were given two

1           months in which to train Cornbread to overcome his  
2           fears?

3                         THE WITNESS: No.

4                         THE COURT: Next question.

5                         BY ATTORNEY PIERCE:

6                         Q.       Mr. Stipka, would you agree --

7                         THE COURT: Would that change any of the  
8                         opinions you've given today if you did have that  
9                         information?

10                        THE WITNESS: No.

11                        THE COURT: Next question.

12                        BY ATTORNEY PIERCE:

13                        Q.       Mr. Stipka, are you aware that Cornbread  
14                         experienced a pulled back muscle in late December of  
15                         2010?

16                        A.       Yes.

17                        Q.       Would you agree that a horse trainer would be more  
18                         likely to be even safer once they've already experienced  
19                         an injury to an animal when they proceed with their  
20                         follow-up training?

21                        THE COURT: I'm sorry. Did you say even  
22                         safer?

23                        ATTORNEY PIERCE: I did.

24                        THE COURT: I'll -- do you have --

25                        ATTORNEY PORTER: That was my objection.

1 THE COURT: Sustained.

2 ATTORNEY PIERCE: I will try it in a  
3 different way.

4 BY ATTORNEY PIERCE:

5 Q. Mr. Stipka, would you agree that a horse trainer  
6 who has experienced one injury would have their index of  
7 suspicion go up so that they had an even higher standard  
8 of care to take care of their animals?

9 THE COURT: First of all, your question  
10 suggests that it's the trainer that has the injury. I  
11 don't think you intended that.

12 ATTORNEY PIERCE: No, not at all.

13 THE COURT: Well, then try it one more time.

14 BY ATTORNEY PIERCE:

15 Q. Mr. Stipka, would you agree that a reasonable  
16 trainer would adopt a higher standard of care in how  
17 they train their animals after one of their animals has  
18 sustained an injury?

19 A. I don't really understand what you mean by  
20 "adopting a higher standard of care."

21 Q. Part of the process of training an animal is to  
22 get it to learn; right?

23 A. Yes.

24 Q. And part of the process of training an animal is  
25 to get the trainer to learn; correct?

1 ATTORNEY PORTER: Objection.

2 THE COURT: Getting the trainer to learn?

3 ATTORNEY PIERCE: That's right, your Honor,  
4 getting the trainer to learn from the process.

5 THE WITNESS: No, I disagree. The trainer  
6 has to know what he's doing.

7 BY ATTORNEY PIERCE:

8 Q. But if the trainer experiences an injury using a  
9 particular procedure, don't you think they should change  
10 their procedures?

11 ATTORNEY PORTER: Objection. This goes back  
12 to the trainer being injured, I think.

13 THE COURT: Yes, it does. The question --  
14 you're not getting it right. I guess what you -- you're  
15 suggesting that the trainer gets the injury in your  
16 question.

17 ATTORNEY PIERCE: I'm not intending to. I  
18 understand the Court's point, your Honor.

19 THE COURT: Go ahead. You may try one last  
20 time.

21 BY ATTORNEY PIERCE:

22 Q. Mr. Stipka, when a trainer has an animal that  
23 experiences an injury, would you agree that they would  
24 reasonably consider that and heighten their standard of  
25 care when they train in the future?

1                   ATTORNEY PORTER: Objection to the  
2 heightened standard of care. I'm not exactly sure what  
3 that means.

4                   THE COURT: All right. I'll overrule the  
5 objection. He can answer if he's able to. If he can't  
6 answer, he can say so.

7                   THE WITNESS: I really do not understand the  
8 question. Standard of care in the stable or what kind  
9 of standard of care?

10                  ATTORNEY PIERCE: I'm just going to move on,  
11 your Honor.

12                  THE COURT: All right.

13 BY ATTORNEY PIERCE:

14 Q. Mr. Stipka, you have testified that there might be  
15 other possible reasons for Cornbread's behavior, and I  
16 want to ask you just a couple of things about that.

17 It's your belief, is it not, sir, that an  
18 employer who is aware of possible causes for animal  
19 changes should investigate; correct?

20 ATTORNEY PORTER: Objection. That's outside  
21 the scope of his --

22 THE COURT: Sustained.

23 BY ATTORNEY PIERCE:

24 Q. All these multiple causes of injuries that you've  
25 identified as possibilities, is there anything that a

1           trainer is supposed to do about them?

2                   ATTORNEY PORTER: I object to the form. I  
3 think he was provided with a hypothetical question.

4                   THE COURT: He's asking whether a trainer  
5 should do anything. I'll let him answer that.

6                   Let's move it along. Go ahead.

7                   THE INTERPRETER: May I ask for the question  
8 to be repeated, please.

9                   THE COURT: Repeat the question.

10                  BY ATTORNEY PIERCE:

11                 Q.       What is it that a trainer should do in light of a  
12 change in behavior or an injury?

13                 A.       If the animal is injured, then the animal has to  
14 rest. It cannot undergo training.

15                 Q.       Is the trainer supposed to report the change in  
16 behavior or the injury?

17                 A.       Yes, definitely, because it may affect his  
18 performance.

19                 Q.       And to whom should he report those changes?

20                   ATTORNEY PORTER: Objection.

21                   THE COURT: I'll sustain that. You have  
22 gone way beyond the scope of the -- and I've given you  
23 wide, wide latitude, Mr. Pierce. So finish it up within  
24 the scope of the direct examination. He was offered as  
25 an expert to give his opinion as to the particular

1 behavior of Cornbread and what should be done about it.

2 Stick to that.

3 ATTORNEY PIERCE: Within that scope, your  
4 Honor, I don't think there's any more reason for me to  
5 ask questions within that scope. So I will have no  
6 further questions.

7 THE COURT: All right.

8 ATTORNEY PORTER: I have a few questions.

9 THE COURT: Mr. Pierce has indicated he has  
10 no further questions within the scope of the direct  
11 testimony.

12 How long do you anticipate you have?

13 ATTORNEY PORTER: Not very long sir. A  
14 time? Five minutes.

15 THE COURT: All right. Let's do it.

16 REDIRECT EXAMINATION

17 BY ATTORNEY PORTER:

18 Q. You were asked questions about your experience in  
19 Europe on a one-ring circus environment.

20 Since you've come to Feld, have you had  
21 experience in a three-ring environment?

22 A. Yes, I do have experience with more rings.

23 Q. And in your experience, have you presented your  
24 animals and trained your animals for presenting in a  
25 ring when other things are going on in the dark rings?

1           **A.**     Yes, it can be put that way.

2           **Q.**     Mr. Pierce asked you a question that suggested  
3           that you had a situation that you had dealt with, and I  
4           don't think you for a chance to explain what that was.

5                         Can you explain to the jury the situation  
6           that you had with a horse who had trouble performing an  
7           element either right before the show, I think you  
8           described it, right before the act started or --

9                         Do you recall the question he asked you?

10          **A.**     Our performance has two combined elements. It's  
11          aerobatics and horses.

12          **Q.**     Did you have an issue with one of the horses  
13          having a concern with one of the aerialists?

14          **A.**     In my ring, there is an aerialist above my horses.  
15          In the next ring, there are two aerialists in the air.  
16          And as soon as I -- I enter with my horses while they  
17          are in the air. As soon as we enter, their performance  
18          ends and my performance starts.

19          **Q.**     Something is happening in another ring while your  
20          performance starts.

21          **A.**     In Ring No. 1, something is happening.

22          **Q.**     And to the extent your horse had some fear of  
23          that, is that something you've been overcome -- you've  
24          been able to overcome with training?

25          **A.**     I'm still working on the horse. It's still not

1           perfect. But it is not really doing performance when  
2           the horse had a problem. It was just entering the ring.  
3           Once all the floodlights are on us and we start our  
4           performance, we have no problems.

5           **Q.**       You mentioned, I think -- you were asked that the  
6           training needs for horses may be very different.

7                          Do you recall that series of questions?

8           **A.**       Yes.

9           **Q.**       Does it mean that because horses have different  
10           needs, that issues can't be overcome?

11           **A.**       No. I disagree with that conclusion. This is an  
12           everyday problem that I face day by day. When I perform  
13           liberty horse training, I have six horses in the ring.  
14           And every one of them have different training needs. So  
15           it's just our daily bread.

16           **Q.**       Let me ask a question about the videos that you  
17           saw.

18                          Do you recall seeing a video where Cornbread  
19           performed his act with the lights on while the cage  
20           strike was happening?

21           **A.**       Yes.

22           **Q.**       Did that give you a sense of the -- Cornbread's  
23           act once the lights were out?

24                          THE INTERPRETER: Your Honor, I did not  
25           understand the question. May I have it repeated,

1 please.

2 THE COURT: Yes.

3 BY ATTORNEY PORTER:

4 Q. Did watching that video with the lights on give  
5 you a sense of Cornbread's act in the videos you watched  
6 when the lights were off?

7 A. I probably -- if the lights were not on the horse,  
8 I probably could see more reactions of the horse, but I  
9 am not sure about it.

10 Q. Did you ever see Cornbread try and run away?

11 A. No.

12 Q. Mr. Pierce asked you about your experience  
13 training horses with tigers or acclimating them to  
14 tigers.

15 Do you have experience training horses  
16 getting them used to other types of animals?

17 A. Yes, with camels and elephants.

18 Q. Another question he asked you, he said you'd  
19 never -- I think you told him you'd never performed a  
20 comedy act; is that right?

21 A. That's correct.

22 Q. Is a comedy act anything more than just a series  
23 of trucks?

24 A. No, it is not.

25 Q. Does the horse have to get the joke in order for

1 it to be a comedy act?

2 **A.** No.

3 ATTORNEY PORTER: Thank you, sir. No  
4 further questions.

5 THE COURT: Let me ask you, Mr. Pierce asked  
6 you about a Czech saying.

7 Do you recall that question?

8 THE WITNESS: Yes.

9 THE COURT: What was that Czech saying?

10 THE WITNESS: Whose bread you eat, that  
11 person's song you sing.

12 THE COURT: All right. And are you  
13 singing -- in the opinions that you gave today, are you  
14 singing the song of Ringling Bros. because they pay you?

15 THE WITNESS: No. Ringling Bros. don't pay  
16 me for singing their song. They pay me for training  
17 their horses.

18 THE COURT: Anything further from either  
19 said based on the redirect and the Court's question.

20 ATTORNEY PIERCE: Just one thing.

21 RECROSS-EXAMINATION

22 BY ATTORNEY PIERCE:

23 **Q.** Did they pay you extra today or is your testimony  
24 part of your normal duties?

25 **A.** Part of my normal duties.

1                   THE COURT: All right. You may step down.

2                   Did you have more?

3                   ATTORNEY PIERCE: No. I wanted to ask that  
4                   the witness not be excused because I would like the  
5                   opportunity to call him in rebuttal.

6                   THE COURT: No. This is your opportunity  
7                   now.

8                   ATTORNEY PIERCE: Your Honor --

9                   THE COURT: You can't call a witness in  
10                  rebuttal. This is an expert witness offered only for  
11                  expert opinion, not for facts. So any question you want  
12                  to ask him, you'd better ask him now related only to his  
13                  expert opinion.

14                  ATTORNEY PIERCE: The questions I would want  
15                  to ask you've indicated are outside the scope, and  
16                  that's why I've indicated --

17                  THE COURT: What questions are those?

18                  They're not in rebuttal. You may want to elicit new  
19                  facts. That's not rebuttal.

20                  ATTORNEY PIERCE: There has been -- the  
21                  testimony I'd want to rebut was their position regarding  
22                  the need to --

23                  THE COURT: All right. Let's do it this  
24                  way.

25                  You may step down.

1                   Ladies and gentlemen, pass your books to the  
2 right. Mr. Wood will collect them and maintain their  
3 security. And I'll hear argument of counsel out of the  
4 hearing of the jury.

5                   And Mr. Stipka will remain here until I hear  
6 Mr. Pierce.

7                   Ms. Owensova, thank you, but be sure that  
8 you tell Mr. Stipka that he has to remain here until he  
9 gets the approval from Mr. Porter to depart.

10                  ATTORNEY PORTER: And she does as well.

11                  THE COURT: And you have to stay as well, of  
12 course.

13                  THE INTERPRETER: Thank you.

14                  THE COURT: You may follow Mr. Wood out.  
15 Remember to refrain from discussing the matter among  
16 yourselves or with anyone.

17                  This is, in effect, our luncheon recess.  
18 But your sandwiches -- I think you had menus this  
19 morning; is that right?

20                  But I don't think I set the time at 11:30.

21                  12:30?

22                  Well, let's see if we can finish the  
23 testimony before 12:30, then.

24                  Thank you. You may follow Mr. Wood out.

25                  Oh, yes. I can't give a time when we'll be

1 back, but it will be as soon as I can deal with this  
2 issue.

3 (Jury excused at 11:25 p.m.)

4 THE COURT: All right. Now, you may be  
5 seated.

6 Mr. Pierce, of course, as I would assume you  
7 know, rebuttal testimony is to rebut something that the  
8 plaintiffs did not get an opportunity to address in  
9 their case-in-chief. It is not to elicit new facts.  
10 And any questions you want to ask this witness have to  
11 be within the scope of his direct.

12 What is there that you want to ask him that  
13 you contend is appropriate rebuttal testimony?

14 ATTORNEY PIERCE: The defendant has taken  
15 the position as part of their case regarding how to  
16 respond to an incident what is an appropriate safety  
17 concern, how do you investigate it, is there a  
18 responsibility to investigate, does a consultant or an  
19 animal professional need to be brought in.

20 These are matters that this gentleman has  
21 expressed his opinion on in his deposition.

22 THE COURT: I don't believe that the  
23 defendant's raised it. You raised it in your  
24 case-in-chief.

25 ATTORNEY PIERCE: And they've raised it in

1                   their position as well, your Honor.

2                   THE COURT: They've taken the position that  
3 there wasn't a safety issue.

4                   What is it that this witness has to offer  
5 that you think is appropriate rebuttal?

6                   ATTORNEY PIERCE: Well, I'll summarize his  
7 testimony.

8                   He has indicated that once the performer  
9 advises the employer of a safety issue or potential  
10 problems, it is the employer's responsibility to jointly  
11 solve the issue with the trainer.

12                  THE COURT: So you knew about this in his  
13 deposition.

14                  ATTORNEY PIERCE: I'm summarizing out of his  
15 deposition, that is correct.

16                  THE COURT: So you knew about it. You could  
17 you have presented it in your case-in-chief.

18                  ATTORNEY PIERCE: That is theoretically  
19 possible, yes. I could have subpoenaed him, that's  
20 right.

21                  THE COURT: All right. Go on.

22                  What else do you have to say about this  
23 issue?

24                  ATTORNEY PIERCE: He indicated that it is up  
25 to the employer to cooperate and to sort of jointly

1 proceed in the training process with the trainer, create  
2 the right environment. It's a joint undertaking, and  
3 that that is an issue that's very important to him and  
4 is something that they continue to have apparently  
5 weekly meetings discussing that process on the red unit  
6 currently. That's -- he's indicated the degree to which  
7 they take that issue, and he's indicated that an  
8 employer who is properly addressing safety issues would  
9 proceed in this way.

10 THE COURT: All right. Mr. Porter.

11 ATTORNEY PORTER: I would love to see those  
12 citations. Judge, just to give you a little bit of  
13 background --

14 THE COURT: You don't agree with his summary  
15 of the testimony.

16 ATTORNEY PORTER: Not in that way. My  
17 understanding and what I think he's trying to get at is  
18 during the course of his deposition -- recall that we  
19 had designated Mr. Stipka as an expert witness. We had  
20 provided an expert report. We had put him up and made  
21 him available for a deposition.

22 During the course of that deposition,  
23 Mr. Pierce asked what I thought at least were a series  
24 of abusive questions that were well outside the scope of  
25 the designation. I made countless objections during the

1 course of the deposition.

2 And I think what he's referring to, although  
3 I don't have the citations, so I can't be sure -- I  
4 think what he wants to do is ask him the questions that  
5 he forced him to answer over my objections.

6 THE COURT: And they're questions about the  
7 meetings and --

8 ATTORNEY PORTER: I don't -- personally, I  
9 don't remember anything about a meeting. I think some  
10 of this is what you ruled on earlier in the motion in  
11 limine before the case started about -- the one you had  
12 last Friday.

13 Do you recall that motion that Ms. Proctor  
14 argued?

15 THE COURT: Yes.

16 ATTORNEY PORTER: And you excluded all that  
17 stuff. And I think -- this sounds to me like the same  
18 sort of issue.

19 THE COURT: It doesn't sound to me like  
20 that. It does sound to me different.

21 Mr. Pierce, do you have anything else you  
22 wish to say before I rule?

23 ATTORNEY PIERCE: It had nothing to do with  
24 his testimony regarding Paragraph 7C.

25 THE COURT: I think I agree with you on

1 that.

2 ATTORNEY PIERCE: And the testimony that I'm  
3 attempting to summarize is Pages 108, 109 primarily.  
4 There's a reference on Page 106 of his deposition as  
5 well.

6 THE COURT: And you seek to exclude it,  
7 Mr. Porter? You move to exclude it.

8 ATTORNEY PORTER: Yes, sir. I think it's  
9 outside his designation. I'm just looking quickly.  
10 And, for example, "Do you believe that an employer using  
11 good faith to promote animal safety should investigate  
12 when a trained animal suddenly starts behaving in an  
13 unexpected way?"

14 "Objection; outside the scope of  
15 designation, otherwise improper."

16 It goes on like that for pages, and I can't  
17 instruct him not to answer. So ultimately perhaps he  
18 gives an answer, but it's outside his designation. It's  
19 not what he was designated to testify about. If they  
20 wanted to put on an expert witness to address these --

21 THE COURT: Well, they didn't need an  
22 expert. They could have gotten an expert. But if there  
23 were some facts that they learned through this  
24 deposition --

25 You may be seated.

1                   I'm going to sustain the motion to exclude  
2 his testimony as rebuttal testimony. It does not seem  
3 to me to be rebuttal testimony. It seems to me that the  
4 plaintiffs want to introduced testimony about what  
5 Ringling Bros. does when safety issues are reported in  
6 the red unit where he works, something about meetings.

7                   All of this is information that Mr. Pierce  
8 had long before the trial. He also raised in his direct  
9 case that they thought there was a safety issue and that  
10 there was an obligation to investigation. They asked  
11 the plaintiffs on the stand whether any investigation  
12 was done.

13                  So clearly the plaintiffs thought this was  
14 an issue, and they could have subpoenaed witnesses to  
15 get this done or do it through discovery, and it was not  
16 so done. This is not rebuttal testimony. And so I'm  
17 going to exclude if on that basis.

18                  Now, do you have rebuttal testimony that you  
19 wish to offer other than that, Mr. Pierce?

20                  ATTORNEY PORTER: May I interject very  
21 briefly? I don't know if you're asking if I'm closed.  
22 If I am, I just want to add --

23                  THE COURT: Yes, I will come to that in a  
24 minute.

25                  ATTORNEY PORTER: Thank you, sir.

1                   THE COURT: Do you have rebuttal testimony?

2                   ATTORNEY PIERCE: If you'll give me just a  
3 moment to talk to my clients, your Honor.

4                   THE COURT: Oh, yes, of course, you may do  
5 that.

6                   Oh, well, if you're going to go out, I'm  
7 going to recess. I'll give you a few-minutes' recess,  
8 Mr. Pierce, so that you can discuss it with them.

9                   Now, remember rebuttal testimony does not  
10 give the plaintiffs an opportunity to repeat what  
11 they've already said.

12                  Do you understand that?

13                  ATTORNEY PIERCE: Yes, your Honor.

14                  THE COURT: That's a waste of everybody's  
15 time, and that's not what rebuttal is about. Rebuttal  
16 is to address specific issues that they did not address,  
17 that did not come up until the defense case.

18                  Yes, Mr. Porter.

19                  ATTORNEY PORTER: The only thing that I  
20 wanted to point out to your Honor is -- and I don't want  
21 to predict what Mr. Pierce is going to do, but I suspect  
22 that what he may be looking to do is some sort of expert  
23 testimony to rebut Mr. Stipka. There certainly was no  
24 rebuttal designation that was ever provided --

25                  THE COURT: They can't introduce expert

1 testimony now.

2 ATTORNEY PORTER: Thank you.

3 THE COURT: Let me -- when you discuss it,  
4 if you feel that you wish to offer any rebuttal  
5 testimony, I want you to disclose it in detail to  
6 Mr. Porter so that I can deal with any objection to it  
7 before I get the jury in and we hear it. But you  
8 understand that the standard is a stringent one. This  
9 isn't an opportunity to repeat matters that were covered  
10 in the direct case. It's only an opportunity to address  
11 new matters that they didn't have an opportunity to  
12 address before.

13 ATTORNEY PIERCE: I do understand.

14 THE COURT: Court stands in recess for ten  
15 minutes.

16 (Court recessed at 11:35 p.m.)

17 (Court called to order at 11:47 p.m.)

18 THE COURT: Mr. Pierce, do you have rebuttal  
19 testimony that you wish to offer?

20 ATTORNEY PIERCE: No, your Honor. I'm all  
21 right.

22 THE COURT: What are the two exhibits?

23 ATTORNEY PORTER: Defendant's Exhibits 81  
24 and 82. They were the video and the audio of the  
25 altercation on December 18th. We argued about them

1 previously and --

2 THE COURT: We saw it here.

3 ATTORNEY PORTER: I just --

4 THE COURT: All right. I'll admit it.

5 ATTORNEY PORTER: -- neglected to offer  
6 them.

7 THE COURT: All right. Now, I'm going to  
8 have the jury brought in, tell them that ends the  
9 testimony in the case. Then I'm going to let them go to  
10 lunch. I'm going to ask them to return by 1:30. I want  
11 to give you all an opportunity to have some lunch, too.  
12 And we'll probably go back in court for closing  
13 arguments at 2:00, but I anticipate that from 1:30 to  
14 2:00 we'll do an instructions conference.

15 And I will prepare a group of instructions  
16 for you to review, to consult with one another. I'll go  
17 through all of that. Let me release the jury first, and  
18 I'll have some instructions for you as well on what you  
19 need to do for exhibits.

20 Bring the jury in, please.

21 (Jury impaneled at 11:48 a.m.)

22 THE COURT: Ladies and gentlemen, thank you  
23 for your patience. The lawyers are working hard to  
24 expedite this matter. And I think we -- and we have now  
25 completed the testimony in the case. We now have some

1 other legal matters to do, and then we'll have closing  
2 arguments and final instructions.

3 And so we'll have a very long lunch hour in  
4 which we, the lawyers and I, can get all of that done.  
5 And then we will be prepared to proceed with closing  
6 arguments and final instructions on the law, and then  
7 you'll be permitted to retire and deliberate on your  
8 verdict.

9 Thank you for your patience. I assure you  
10 that the lawyers and I ARE doing everything we can to  
11 move matters along. Again, during the luncheon recess,  
12 I made arrangements for you to have sandwiches. I hope  
13 they're satisfactory to you. If not -- I don't  
14 anticipate that we will reconvene until no earlier than  
15 1:30. So you need not be back. If you wish to go out,  
16 you may do so. 1:30.

17 Thank you for your patience and your  
18 attention. You may follow Mr. Wood out. Remember  
19 during the recess to refrain from discussing the matter  
20 among yourselves or with anyone or undertaking any  
21 investigation, electronically or otherwise. You may  
22 follow Mr. Wood out.

23 (Jury excused at 11:50 a.m.)

24 THE COURT: All right. You may be seated.

25 Now, what we have to do is this: First of

1 all, I'm going to hear argument on the Rule 50 motion,  
2 then I'm going to recess the matter for you all to have  
3 lunch, and then I'll set a time for return, at which  
4 time I'll rule on the Rule 50 matter.

5 I will also make arrangements for you to  
6 pick up a package of instructions to read them. And  
7 then if you have objections to the instructions, either  
8 what's included or what's omitted based on what you've  
9 submitted or anything else, then you are to review those  
10 with opposing counsel.

11 Because when I meet with you and you assert  
12 an objection as to something that's been included or  
13 omitted, I want to hear informed argument. So I want  
14 you to tell the other side what your objection is, what  
15 it's based on, what authority you're relying on to give  
16 them an opportunity to be able to respond to it  
17 effectively.

18 And then I think the earliest we can get  
19 that done is to reconvene -- reconvene at 1:30. At  
20 1:30, I will rule on the Rule 50 matter. And then, if  
21 appropriate, I will go on to make sure that you have  
22 time to review the package of instructions which I'm  
23 working on and then to have the instructions conference,  
24 and then we will have closing arguments and the Court's  
25 final instructions.

1                   How long do you think you need for closing  
2 argument, Mr. Pierce?

3                   ATTORNEY PIERCE: I would say about  
4 20 minutes, your Honor.

5                   THE COURT: Mr. Porter?

6                   ATTORNEY PORTER: I agree with that.

7                   THE COURT: Well, that's -- those are  
8 reasonable times.

9                   All right. Mr. Porter, I'll hear from you.

10                  This is a motion for judgment as a matter of  
11 law, is it, under Rule 50?

12                  ATTORNEY PORTER: Yes, sir.

13                  THE COURT: Well, you understand that under  
14 Rule 50, you need to give me -- you need to be somewhat  
15 specific and give me the authorities that you're relying  
16 on.

17                  In fact, the specific term is a motion for  
18 judgment as a matter of law may be made at any time  
19 before the case is submitted to the jury. The motion  
20 must specify the judgment sought and the law and facts  
21 that entitle the movant to the judgment.

22                  Go ahead, sir.

23                  ATTORNEY PORTER: Yes, sir. I started as  
24 argument. We had a bench conference before.

25                  THE COURT: I gave you an opportunity.

1                   ATTORNEY PORTER: And to recap that, the  
2 main issue here is that we have a fundamental  
3 difference -- threshold instance issue about what's  
4 going on here. There's a contract that Feld entered  
5 into with these Donnerts that required them to act as  
6 directed. And there's simply been no testimony that  
7 Feld did anything to breach that contract. There's no  
8 evidence of any wrongful conduct on the part of Feld  
9 whatsoever.

10                  The only evidence is that there was a  
11 disagreement about how this act ought to go forward.  
12 The evidence is that the show order changed. There were  
13 problems. There's no evidence that Feld ever complained  
14 of the problems. There's no evidence that Feld ever put  
15 an ultimatums on them.

16                  Instead, the evidence was that they said  
17 they were not going to perform. Feld tried to work  
18 through some options with them. All those options were  
19 rejected. After they were rejected, Feld reasonably  
20 believed that they had grounds pursuant to the contract  
21 to terminate the plaintiffs for failure to act as  
22 directed.

23                  THE COURT: Now, what provision of the  
24 contract do you rely on in saying that?

25                  ATTORNEY PORTER: There are three

1 provisions: There's a provision in the contract --  
2 really two in the contract, one in the lease, and then  
3 one in the addendum that speaks to the plaintiffs'  
4 obligation to act as directed.

5 The first one is in -- I'm looking at  
6 Defendant's Exhibit 1. It's really Plaintiffs' 27,  
7 which is the contract. Let me pull my notes from  
8 somewhere else. Court's indulgence for one moment.

9 Paragraph 1, the provision there reads --  
10 not 1A or B, but this is 1 primary. It says, "The  
11 employer hereby agrees to employ the act under the  
12 supervision, direction, and control of the employer."

13 And then 1A on that same page says, "During  
14 the employment period, as directed by the employer,  
15 employee agrees to appear and perform one or both of  
16 those horse-riding acts that are referenced in the  
17 contract."

18 B continues on and says, "In the event" --  
19 gives Feld the right to transfer them. That's not  
20 really the issue in this Rule 50 motion. The lease  
21 issue, which is Plaintiffs' Exhibit 28 --

22 THE COURT: The lease is connected to the  
23 contract, isn't it?

24 ATTORNEY PORTER: It is.

25 THE COURT: If there's a breach of the

1 contract, there automatically a breach of the lease.

2 ATTORNEY PORTER: Right. And what I was  
3 going to point out to you, your Honor, is that there's  
4 similar language in the lease that requires these  
5 plaintiffs to act as directed.

6 THE COURT: All right. And then in the  
7 addendum, it's Paragraph --

8 ATTORNEY PORTER: 8.

9 THE COURT: 8. 14.1 of the employment  
10 agreement is revised.

11 ATTORNEY PORTER: Yes, sir.

12 THE COURT: All right. And that says -- go  
13 ahead.

14 ATTORNEY PORTER: That says that, "The  
15 employee understands that if it fails to perform in a  
16 first-class professional manner, disrupts or impedes  
17 employer's creative and production value and direction  
18 of the production in any way either through action or  
19 failure to comply with employer's instruction or if  
20 employee otherwise conducts himself/herself in a manner  
21 unsatisfactory or detrimental to the reputation or  
22 standards of the employer including, but not limited  
23 to" -- I'll do a "..." there - "is grounds for  
24 termination."

25 THE COURT: Now, am I correct that distilled

1 to its essence, your position is that the contract,  
2 especially the addendum, makes clear that the sequence  
3 in which the show is put on, artistic content and  
4 sequence, is within the control -- sole control of the  
5 circus?

6 ATTORNEY PORTER: Yes, sir.

7 THE COURT: And your view is that when you  
8 changed the sequence, you had no obligation to change it  
9 again at the request of the plaintiffs.

10 ATTORNEY PORTER: Yes, sir.

11 THE COURT: And, in your view, because the  
12 circus had the exclusive right to control the sequence  
13 of the show, that under this Paragraph 14.1 revised,  
14 Paragraph 8 of the addendum, that the circus had the  
15 right under the contract to terminate the plaintiffs.

16 Is that your position distilled?

17 ATTORNEY PORTER: Yes, sir. And I would add  
18 to that that when the circus went to the Donnerts and  
19 gave them options after they refused to perform, they  
20 still continued to try and work with them. And Again,  
21 the Donnerts --

22 THE COURT: I understand that, but I'm just  
23 looking at the legal -- that's your position, and you're  
24 saying that there isn't any evidence. Now, I think  
25 we'll hear -- Mr. Pierce, am I correct that you're

1       arguing that there's -- that your argument is not any --  
2       that there's a breach of good faith and fair dealing?

3                   ATTORNEY PIERCE: That's certainly part of  
4       it, yes.

5                   THE COURT: Well, what -- can you point to  
6       me the provision in the contract that you say was  
7       violated or breached by the circus?

8                   ATTORNEY PIERCE: Well, I'll start with the  
9       Court's question first.

10                  In the employment contract itself, I think  
11       that you have to read that document in theory with the  
12       lease. So...

13                  THE COURT: Is this the issue that -- which  
14       part of the lease do you think does that? Let me have  
15       the lease up here, please.

16                  Wait a minute. I have them both here.

17                  What provision of the lease are you relying  
18       on?

19                  ATTORNEY PIERCE: Paragraph 7C.

20                  THE COURT: All right. What is -- you're  
21       saying that the defendant's breached -- the defendant  
22       breached 7C of the lease.

23                  ATTORNEY PIERCE: That's correct.

24                  THE COURT: Now, as I read 7C, it imposes  
25       duties on the lessor. But then at the end, it says,

**1** "Lessee agrees to work with lessors to facilitate  
**2** compliance."

**3** ATTORNEY PIERCE: That's correct.

4 THE COURT: And you're saying what, that  
5 there's evidence that they didn't work with the  
6 lessee -- lessor?

7 ATTORNEY PIERCE: Absolutely. Yes.

**8** THE COURT: What else do you contend amounts  
**9** to a breach?

**10** ATTORNEY PIERCE: In addition to this?

15 ATTORNEY PIERCE: There's an implied duty of  
16 good faith in each contract, and it has a slight  
17 difference from the wording that appears here in  
18 Paragraph 7C. But an implied duty of good faith gets to  
19 the same place.

20 THE COURT: All right. Now, you submitted  
21 an instruction to that effect, and you cited a number of  
22 authorities.

23 ATTORNEY PIERCE: I did.

**24** THE COURT: It won't surprise you to learn  
**25** that I've looked at those. And it won't surprise you to

1 learn that I don't think they stand significantly -- let  
2 me see that list.

3 Do you have his list?

4 What I wanted to call to your attention --  
5 well, let me do them anyway. You cited Schreier against  
6 VBR, a Circuit -- Virginia Circuit Court case. I've  
7 read that. It doesn't recognize a duty. It's about  
8 at-will employment only.

9 You might argue, I think from that case as I  
10 looked at it, that essentially what that case says is  
11 there isn't an implied duty of good faith and fair  
12 dealing in an at-will employment, and you might argue  
13 that, "Well, from that you can infer that there is in  
14 other kinds of contracts."

15 But I have looked everywhere for a Virginia  
16 Supreme Court case saying there is a duty of good faith  
17 and fair dealing implied in every contract. There  
18 are -- that duty certainly arises in other states. But  
19 can you cite to me a Supreme Court of Virginia case that  
20 says that? The *Paul Business Systems* case that you  
21 cited doesn't say that. Neither does *Wards Equipment*.

22 ATTORNEY PORTER: Your Honor, I included in  
23 that the authority that I'm aware of that I regarded as  
24 relevant to the topic.

25 THE COURT: All right. Let me cite a case

1 to you that you can go downstairs and read, because I  
2 think you all have access to the law library downstairs.

3 It's open, isn't it, Mr. Wood?

4 THE MARSHAL: Yes, sir.

5 THE COURT: All right. Look, if you will,  
6 at -- although I'm not sure you can get this since it's  
7 recent. There is a May 2nd, 2013 case, *Stony Glen, LLC*  
8 *against Southern Bank & Trust Company*. It's a district  
9 case from the Eastern District of Virginia, Norfolk  
10 Division. And it says as follows. And there are  
11 citations in there to others, but I want you to go look  
12 at this, Mr. Pierce, because I think the cases you cited  
13 don't answer the question. And I've looked, and I don't  
14 find one.

15 You did not submit anything, Mr. Porter.

16 ATTORNEY PORTER: No, sir. We had this  
17 issue, you may recall, at the 12(b) (6) issue you on  
18 whether or not there's a duty of good faith and fair  
19 dealing in these contracts. And you ruled that it  
20 certainly can't rewrite the contract themselves.

21 THE COURT: Right.

22 ATTORNEY PORTER: I was -- quite frankly, I  
23 thought that issue had been resolved by you when we  
24 dealt with it the first time.

25 THE COURT: Even in cases -- there are lots

1       of -- there is a statutory provision in Virginia for the  
2       Uniform Commercial Code that includes a duty of good  
3       faith and fair dealing. And there are cases construing  
4       that that say very clearly, "But the implied duty of  
5       good faith and fair dealing cannot change the duties in  
6       the contract." All it does is say that a duty that is  
7       imposed by the contract must be done in good faith, and  
8       that's in the UCC area.

9                     But I want you go and read this, Mr. Pierce.  
10          It says, "The United States Court of Appeals for the  
11       Fourth Circuit has consistently held that Virginia does  
12       not recognize an implied duty of good faith and fair  
13       dealing in common law contracts." And then it cites a  
14       number of cases.

15                     The first case it cites is an unpublished  
16       Fourth Circuit case which said that in Virginia every  
17       contract contains an implied covenant of good faith and  
18       fair dealing. And so there are some cases that don't  
19       recognize it.

20                     Well, let's assume for argument's sake right  
21       now that there's an implied faith -- duty of good faith  
22       and fair dealing in this contract. Mr. Pierce, let's  
23       assume that, because I may yet conclude that.

24                     Now, what is it -- what provision of the  
25       contract did they not perform in good faith? You see,

1       it doesn't add new obligations. For example, it doesn't  
2       mean that your client has the power to change the  
3       sequence of the show. What is it that you contend is  
4       the obligation that they did not perform in good faith?

5                   ATTORNEY PIERCE: I have two parts to that,  
6       your Honor.

7                   The first part is largely building on what  
8       you've already heard. 7C, to the extent that it doesn't  
9       lend itself to its own duty of good faith, because the  
10      phrase that appears at the end of 7C is -- has some  
11      relationship to a measure of good faith. Set that  
12      aside.

13                  We take the position, your Honor, that there  
14      are multiple places in these --

15                  THE COURT: You're not going to -- I'm not  
16      interested in general. I said which provisions. You  
17      said 7C.

18                  What else did they not do in good faith?

19                  ATTORNEY PIERCE: One moment, your Honor.

20                  THE COURT: All right.

21                  ATTORNEY PIERCE: There's an introductory  
22      phrase to 7C itself. It's illustrative of the point I  
23      want to make.

24                  THE COURT: I asked you which -- show me in  
25      the contract which provisions that impose duties on the

1       circus that you think apply in an implied duty of good  
2       faith and fair dealing. Because you don't get extra  
3       duties. You admit -- in fact, one of the cases you  
4       cite, you can't expand the duties or rewrite the  
5       contract using the implied duty of good faith and fair  
6       dealing; isn't that right?

7                     ATTORNEY PIERCE: It is correct as you have  
8       phrased that, your Honor.

9                     THE COURT: So all I'm seeking, because I  
10       have to make a decision, you told me 7C, and you've told  
11       me that 7C says the lessee agrees to work with lessors  
12       to facilitate compliance, and that's compliance with  
13       safety is the paramount concern to lessee as it relates  
14       to animals, the public, and lessee's animal care and  
15       other staff.

16                   Lessors -- that's your clients -- will take  
17       all necessary steps to ensure such level of safety. All  
18       right. I understand that. And that the lessee agrees  
19       to work with the lessors to facilitate compliance.

20                   And you're saying that they didn't act in  
21       good faith to work with lessors to facilitate compliance  
22       with safety as your client sought and that, as I  
23       understand the testimony, the problem with that -- and  
24       this is the crux of the Rule 50 question, Mr. Pierce --  
25       is your client said in their testimony, Mr. Donnert did,

1           that the only solution was to change the order of the  
2       show. And I think he said, in answer to a question I  
3       asked, that Cornbread would never do it.

4           So the amount of time given really was  
5       irrelevant. He was never going to do it. The only  
6       solution was changing the order of the show. It's a  
7       stretch to say that good faith -- implied duty of good  
8       faith and fair dealing requires that when the contract  
9       unambiguously says that it's the circus' power to direct  
10      the content and order of the show. But you've told me  
11      about 7C.

12           What else do you have?

13           ATTORNEY PIERCE: Your Honor, I want to use  
14      7C to go in a slightly different direction, though. The  
15      introductory passage of 7C says that the lessee, Feld,  
16      has safety as its paramount concern.

17           THE COURT: No. It sales lessors.

18           Are you talking about some -- other than 7C?  
19      It says lessors also acknowledge.

20           ATTORNEY PIERCE: Lessors shall acknowledge  
21      that --

22           THE COURT: No, also acknowledge that.

23           And who is the lessors?

24           ATTORNEY PIERCE: We are.

25           THE COURT: Right.

1                   ATTORNEY PIERCE: But let me finish that  
2 sentence.

3                   "Safety is of paramount concern to lessee."  
4 To say that -- and I need to bridge into another part of  
5 my argument. But to say that I think means that you've  
6 got to proceed in good faith, that that was actual -- a  
7 factual --

8                   THE COURT: Well, that depends on -- that  
9 depends on whether there's an implied duty of good faith  
10 and fair dealing.

11                  What other provision other than 7C do you  
12 rely on?

13                  ATTORNEY PIERCE: Your Honor, I believe that  
14 there are similar types of references --

15                  THE COURT: I don't want what you believe.  
16 I asked for specific provisions.

17                  ATTORNEY PIERCE: That's sufficient to make  
18 my argument. So I'll --

19                  THE COURT: All right. Now, Mr. Porter, why  
20 do you think that the implied duty of good faith and  
21 fair dealing issue was resolved at the 12(b)? I don't  
22 recall making any ruling that there was or was not an  
23 implied duty of good faith and fair dealing.

24                  ATTORNEY PORTER: It was a ruling not made  
25 with respect to this particular provision of the lease.

1 It was with respect to the rubber mats. One of the  
2 issues in the original complaint was they claimed that  
3 Feld had an obligation to put down certain rubber mats,  
4 and --

5 THE COURT: But I dealt with that on the  
6 terms of the lease, not dealing with an implied duty of  
7 good faith and fair dealing.

8 ATTORNEY PORTER: That was the argument that  
9 was made. The argument that was made was that -- we  
10 took the position that the lease required them to --

11 THE COURT: I understand that.

12 ATTORNEY PORTER: Yes, sir.

13 THE COURT: It wasn't -- I didn't rule on  
14 whether there was or was not an implied duty of good  
15 faith and fair dealing. I ruled that that matter of  
16 mats, as I recall, was their problem, not yours; right?

17 ATTORNEY PORTER: You did.

18 THE COURT: That's doesn't mean -- that's  
19 just -- that can be the same ruling whether there's an  
20 implied duty of good faith and fair dealing or not.

21 ATTORNEY PORTER: Right, except their  
22 argument was that you had to --

23 THE COURT: I haven't ruled on whether there  
24 is or isn't.

25 Do you have any authority as to whether in

1                   Virginia there is an implied duty of good faith and fair  
2 dealing?

3                   ATTORNEY PORTER: It's our position that  
4 there is not an implied duty of good faith and fair  
5 dealing.

6                   THE COURT: All right. Then I want you to  
7 be sure you read this case.

8                   ATTORNEY PORTER: I will do that.

9                   Do you have the citation? You gave the --

10                  THE COURT: 2013 WL 1897111. It's Stony  
11 Glen against Southern Bank & Trust.

12                  ATTORNEY PORTER: Do you know if there's  
13 access to -- I'll figure that out.

14                  THE COURT: I don't know.

15                  ATTORNEY PORTER: I don't know either.

16                  THE COURT: So I think that's the central  
17 issue I have to decide.

18                  ATTORNEY PORTER: Could I address the lease,  
19 the 7C argument?

20                  THE COURT: Yes.

21                  ATTORNEY PORTER: There are two parts, I  
22 think, to this, your Honor, with respect to this implied  
23 safety argument that they're making. And one is that I  
24 don't think that the lease supports the obligation that  
25 they're suggesting that it does.

1                   And I think that to read it in a way that  
2 they're asking you to read it would, in fact, be  
3 creating -- would be modifying the contract, which I  
4 think the law is fairly clear that you can't do. An  
5 implied duty of good faith and fair dealing can't change  
6 the contract.

7                   And if you look at 7, you can't just start  
8 with 7C, you've got to start back with 7A to put the  
9 paragraph in context. Because what 7A says is it says,  
10 "Lessors acknowledge there are international and U.S.  
11 federal, state, and local laws and regulations governing  
12 animals including, but not limited to, their  
13 transportation, housing, care, health status, husbandry,  
14 and treatment."

15                  It goes on to say, "Lessors agree that  
16 lessors," Donnerts, "shall -- and shall cause the acts,"  
17 meaning their acts, "to at all times throughout the term  
18 comply with all such laws as well as lessee's current  
19 policies."

20                  Then if you take that to C, what C is  
21 talking about there, Judge, when it says that lessee  
22 agrees to work with lessors to facilitate compliance,  
23 that paragraph is saying that Feld will work with the  
24 Donnerts to comply with the U.S. federal, state, and  
25 local laws and their own policies.

1 So to read into 7C a generic obligation that  
2 Feld has an obligation to work to promote the safety of  
3 their acts would be changing the contract.

The second part to that, Judge, is even assuming that may be the case, the undisputed evidence here is that Feld did work with them. Feld worked with them. They offered them options.

12 So once the act refused to work, Feld  
13 offered them options to train, try and make this thing  
14 work. That's working together. That's evidence they at  
15 least tried to work together. But I think you need not  
16 get that far because the compliance referred to in 7C  
17 relates to compliance with U.S. federal, state, and  
18 local regulations.

**19** THE COURT: All right. Anything else?

**20** ATTORNEY PORTER: No, sir.

21 THE COURT: What's your response,  
22 Mr. Pierce?

23 ATTORNEY PIERCE: First, regarding the  
24 construction of Paragraph 7 in the lease, Paragraph 7A  
25 as a subpart talks about two categories of standards, if

1 you will. One are laws, affirmative organic laws, as  
2 well as company internal policies regarding handling.  
3 That's the sum and substance of 7A, and that's why 7A  
4 stands as a whole.

5 In another location in Paragraph 7C, the  
6 scope of Paragraph 7C is something completely different.  
7 The scope of Paragraph 7C is safety obligations. That's  
8 a different phenomenon. It's not even included in the  
9 scope of Paragraph 7A. That's why there's two  
10 paragraphs on these separate topics.

11 And the language that we're relying on only  
12 appears in and only relates to the obligation of Feld to  
13 help facilitate compliance with safety obligations. It  
14 doesn't have any bearing on 7A. There's no internal  
15 pointers that would lead you back to that construction.  
16 7C stands on its own. That paragraph -- that phrase at  
17 the end of it modifies it.

18 Next point, your Honor, the language that  
19 appears at the introduction of 7C, you will see very  
20 comparable language in Paragraph 14H of the employment  
21 contract. I only bring that up to say that they both  
22 say the employer has adopted utmost safety as being  
23 important to them.

24 And I think that if they represent in a  
25 contract a fact like that, then they have a

1 responsibility, have a good faith responsibility to live  
2 up to that.

3 Next point, your Honor.

4 THE COURT: 14 what?

5 ATTORNEY PIERCE: H.

6 THE COURT: All H says is employee  
7 understands that the health, safety, and welfare of the  
8 animals are of the utmost importance to employer.

9 How does that relate to this case?

10 ATTORNEY PIERCE: I think it has a  
11 representation by them that, in fact, that is the  
12 position that they've adopted.

13 THE COURT: Are you going to take the  
14 position that that provision entitles the plaintiffs to  
15 control the order of the acts?

16 ATTORNEY PIERCE: It's --

17 THE COURT: Yes or no?

18 ATTORNEY PIERCE: I'm going to answer no as  
19 you've phrased the question.

20 THE COURT: All right. Then I don't see  
21 the -- because I don't think it does. It doesn't give  
22 them the power to control. See, that's what I keep  
23 coming down to.

24 If Cornbread couldn't do it, that's the  
25 problem of the plaintiffs. If Cornbread couldn't do it

1           the way they wanted it done and it's in the exclusive  
2           power of the circus to control the order of the acts,  
3           then they can't perform their contract.

4                         ATTORNEY PIERCE: Except that --

5                         THE COURT: And I don't know why you threw  
6                         in the stuff about injury. If the horse can't do it,  
7                         then they can't do the act. Then they ought not to get  
8                         paid for it under the contract unless they have a  
9                         substitute horse, which they had, that didn't work out.

10                  ATTORNEY PIERCE: Your Honor, if I can  
11                  bridge to a related concept.

12                  THE COURT: Yes.

13                  ATTORNEY PIERCE: In our Proposed Jury  
14                  Instruction 18 -- and although I didn't itemize  
15                  individual authorities, to the effect is *Spotsylvania*  
16                  *County vs. Seaboard Surety*, 243 Virginia 202 at Pages  
17                  209 and -10.

18                  THE COURT: All right. And what does that  
19                  stand for?

20                  ATTORNEY PIERCE: They stand for the notion  
21                  that a party, in this case Feld, cannot take conduct  
22                  that prevents us from performing our obligations under  
23                  the contract. And how that applies in our scenario is  
24                  we have affirmative safety obligations under this  
25                  contract. If they impose requirements on us that

1 prevent us from performing the safety obligations that  
2 we have agreed to take on, they fall within this --

3 THE COURT: So your view is that by changing  
4 the order of the shows, they rendered it impossible for  
5 your client to perform; is that right? Yes or no?

6 ATTORNEY PIERCE: Effectively. I don't  
7 think it's necessary to phrase it as impossible because  
8 I don't think that legal principle gets that far, but I  
9 would say yes.

10 THE COURT: What does the legal principle  
11 say?

12 ATTORNEY PIERCE: If they prevent us from  
13 being able to perform. We have a Hobson's choice to  
14 make. We've got to go one way or the other. If we go  
15 one way, we're going to violate the safety provision.  
16 And if we go the other way, they're going to say we  
17 violate --

18 THE COURT: What do you mean violate the  
19 safety provision?

20 ATTORNEY PIERCE: Somebody is going to get  
21 hurt. It's an accident waiting to happen.

22 THE COURT: All right. Anything -- all  
23 right. Mr. Porter, you want to respond?

24 ATTORNEY PORTER: I don't know if you want  
25 to hear further on the argument from Paragraph 14H or if

1 you're satisfied with that. But I don't think that  
2 imposes the obligation that they're suggesting.

3 As you've noted, it says that the Donnerts  
4 understand that safety is important to the employer.  
5 And then again, if you read the whole paragraph, it  
6 incorporates the Paragraph 16 material, which is the  
7 animal rights material and federal regulations.

8 As to the point he last made about how we  
9 prevented performance, I'm not really quite sure how I  
10 understand that.

11 THE COURT: Well, what he's saying is that  
12 by changing the order of the show, then given the  
13 plaintiffs' view of the safety considerations, it  
14 prevented them from performing.

15 ATTORNEY PORTER: But that's not a violation  
16 of a right in the contract. We were allowed to control  
17 the order of the show. The performers had no right to  
18 do so. They can either perform as they're directed to  
19 perform or they don't.

20 THE COURT: That's the crux of the Rule 50  
21 motion.

22 ATTORNEY PORTER: Right.

23 THE COURT: Because the evidence in this  
24 case is precisely that.

25 All right. I think I'll rule on this at

**1** 1:30 and then deal with the instructions if it's  
**2** appropriate to do so at that time.

**3** ATTORNEY PORTER: Yes.

**4** THE COURT: You gave me one case to read on  
**5** preventing performance.

6 Anything else you want to call my attention  
7 to, Mr. Pierce, any other authorities?

8 ATTORNEY PIERCE: If you could give me a  
9 moment. I cited to the model pattern instructions.  
10 There are four or five annotations to that. I could  
11 make them available if you like, but it would take me a  
12 minute to get the page out.

13 THE COURT: What good is that going to do me  
14 if it isn't something that's focused on the arguments  
15 that I've heard?

16 ATTORNEY PIERCE: It's focused on the legal  
17 principle behind the jury instruction that I've now  
18 argued to you.

19 THE COURT: All right. Whatever case you  
20 have, let me have it.

ATTORNEY PIERCE: Okay.

**22** THE COURT: And Mr. Porter as well.

**23** Do you have any cases you want me to look  
**24** at?

**25** ATTORNEY PORTER: No, sir. If I could

1 impose upon the Court -- and I hate to do this -- the  
2 Westlaw site, I think we're going to have a lot of  
3 trouble getting down in the library. I don't have a  
4 Westlaw account. I want to be responsive to your  
5 request that we review that case. I want to be  
6 prepared. But I'm not quite sure that I can do it given  
7 what I got.

8 THE COURT: All right. I'll deal with that.

9 ATTORNEY PORTER: Okay.

10 THE COURT: I understand that.

11 Yes.

12 ATTORNEY PIERCE: It's going to take five or  
13 ten seconds to get the page out. If somebody would be  
14 available after court adjourns, I'll hand that up.

15 THE COURT: Are they listed on your proposed  
16 instructions?

17 ATTORNEY PIERCE: No. I only cited to the  
18 pattern number. I have the actual pattern here.

19 THE COURT: Which ones is it that you --  
20 because some of those are irrelevant to this case. I'm  
21 not going to give instructions on offer and acceptance.  
22 That's silly.

23 ATTORNEY PIERCE: My Proposed Jury  
24 Instruction 18 has the pattern number and --

25 THE COURT: 18? And 18 is the one that --

1           is that the *Spotsylvania* case that you cited?

2           ATTORNEY PIERCE: It is.

3           THE COURT: What's the citation to it again?

4           ATTORNEY PIERCE: 243 Virginia 202.

5           THE COURT: Is there a Southeast 2nd to it?

6           ATTORNEY PIERCE: There is, but I didn't  
7           write it down.

8           THE COURT: 243 Virginia?

9           ATTORNEY PIERCE: Correct.

10          THE COURT: What page number?

11          ATTORNEY PIERCE: 202, Pinpoint Cite 209 and  
12          -10.

13          THE COURT: And the style of the case?

14          ATTORNEY PIERCE: It's a Virginia Supreme  
15          Court case.

16          THE COURT: The style. What's the name of  
17          the case?

18          ATTORNEY PIERCE: I'm sorry. *Spotsylvania*  
19          County vs. *Seaboard Surety*.

20          THE COURT: All right. I'll look at that.

21          Anything else, Mr. Pierce?

22          ATTORNEY PIERCE: I don't believe so.

23          THE COURT: I'll recess. We'll reconvene at  
24          1:30. And I have in mind your problem.

25          ATTORNEY PORTER: And sir, do I understand

1           that before we reconvene at 1:30, we're going to get  
2           from you --

3                         THE COURT: No, you won't get it until then.

4                         ATTORNEY PORTER: Okay.

5                         THE COURT: But you'll get my ruling, and  
6                         then you'll get the package, and then you'll have to  
7                         proceed.

8                         ATTORNEY PORTER: Thank you, sir.

9                         THE COURT: Court stands in recess. You'd  
10                        better take the time to have lunch.

11                        ATTORNEY PORTER: Thank you, sir.

12                        (Court recessed at 12:25 p.m.)

13                        (Court called to order at 1:35 p.m.)

14                        THE COURT: All right. The matter is before  
15                        the Court on a motion for judgment as a matter of law  
16                        with respect to, I assume, both of the remaining claims,  
17                        the breach of contract claims for both the breach of the  
18                        employment contract as -- together with the addendum and  
19                        the lease agreement.

20                        It seems to me that the parties agree that  
21                        if there's a breach of the employment agreement and  
22                        addendum, there's a breach of the lease agreement. If  
23                        there's not a breach of the employment agreement, there  
24                        isn't a breach of the lease agreement.

25                        ATTORNEY PORTER: We made an argument that

1 they're separate, but you've already ruled on that  
2 issue, so we're not raising that issue again.

THE COURT: All right. Now, I'm going to continue to take the Rule 50 motion under advisement as the rule permits. I have very significant doubts about whether there really is an issue for the jury in this case, but I'm going to let it go to the jury with one exception: I am going to grant the judgment as a matter of law with respect to any argument made in connection with Paragraph -- I inadvertently left the lease. But I'm going to grant the motion for judgment as a matter of law with respect to the claim for breach of contract with respect to a certain provision of the lease that I have construed.

15                   It makes -- it's important to note that  
16                   ordinarily the construction of a written contract is a  
17                   matter for the Court alone. Many cases provide for  
18                   that, including *American Insurance Company against*  
19                   *Damascus Lumber* at 139 Virginia. If the terms of the  
20                   contract are clear and unambiguous, the Court alone must  
21                   construe the contract, the cases clearly provide. And  
22                   in such a case, it's improper to submit the contract to  
23                   the jury for interpretation.

24 And I think this portion that I'm referring  
25 to is clear and unambiguous. And I am going to grant

1           the motion with respect to that provision, which I'll  
2           come to in a moment.

3                         Where a contract is clear and unambiguous,  
4           no extrinsic evidence becomes admissible, and no  
5           extrinsic evidence was introduced with respect to any  
6           ambiguity relating to the intent of the parties at the  
7           time or anything of that sort.

8                         So the construction of this provision of the  
9           contract is a question of law for the Court alone. This  
10           provision is Paragraph 15, which says that at the end --  
11           oh, it says in the middle that lessors have the sole  
12           responsibility and control of the manner, the means, and  
13           the sequence of performing the services relating to this  
14           lease.

15                         My ruling is that that does not extend to  
16           the order or sequence of the show. In other words, no  
17           argument could be made because I construe that to mean  
18           that the manner, means, and sequence of performing  
19           services related to the lease means services related to  
20           the lease, which isn't the order and artistic content of  
21           the show. It's the animal husbandry, the housing, the  
22           feeding, and so forth of the animals. That's what's --  
23           that's what that means.

24                         And as I said, I've cited substantial  
25           authority that it's for the Court to construe. I think

1           it's clear and unambiguous. There wasn't any evidence  
2 submitted as to the intent of the parties at the time  
3 that somehow that extended to the order of the show. It  
4 didn't. Never was -- it's just not in the plain and  
5 unambiguous language, nor is anything that I read in the  
6 employment contract or addendum supportive of that. It  
7 all contradicts that.

8           That's the problem I'm having with the Rule  
9 50 motion. I think it clearly and unambiguously leads  
10 to the circus as the sole and exclusive control of the  
11 artistic content, which includes the order of the show.  
12 That's part of the artistic content of the show.

13           Now -- but I'm going to allow the matter to  
14 go to the jury on instructions which I will provide to  
15 you in just or couple of minutes in which I think the  
16 essential argument is that the plaintiff claims the  
17 contracts were breached because the contracts have an  
18 implied duty of good faith and fair dealing and that the  
19 plaintiff contends that the -- they raised a safety  
20 issue and that the defendant did not act in good faith  
21 with respect to resolving that. The plaintiff -- the  
22 defendant says they did.

23           I'm going to make clear to the jury that the  
24 implied duty of good faith and fair dealing does not add  
25 any duties. It merely applies to duties that are

1 already in the contract and requires those duties to be  
2 performed in good faith.

3 The reason I'm having difficulty with the  
4 Rule 50 is that I think the order of the show -- they're  
5 not required to change the order of the show. They  
6 can -- "they," meaning the circus, can have the order of  
7 the show in whatever order they want. But -- and I'll  
8 reserve that until the end after there's a verdict if  
9 it's necessary to do so.

10 But here I think the argument of the  
11 plaintiffs is that they had an obligation to work with  
12 us in good faith, and that included changing the order  
13 of the show. Because the testimony was clear that that  
14 was the only remedy, at least for -- I keep forgetting  
15 the horse's name.

16 Fruitcake?

17 ATTORNEY PORTER: Cornbread.

18 THE COURT: It's Christmas. Thanksgiving.  
19 Corn read. That's Thanksgiving, too.

20 And that's essentially the plaintiffs'  
21 argument, that, "They had a duty to negotiate in good  
22 faith. What they offered us wasn't evidence of good  
23 faith." And I think the defense argument is that they  
24 did. It was good faith.

25 The problem is -- with the plaintiffs' case,

1 as I see it, is I don't believe there is any implied  
2 duty of good faith and fair dealing to change the order  
3 of the show. But I'm going to submit the case to the  
4 jury, and we'll see. That's the only basis, I think, on  
5 which the jury might find for the plaintiffs, but we'll  
6 see. I could be wrong. And it may be that the jury  
7 will find for the defendant, in which case all of this  
8 is obviated.

9 Now, I've ruled on Rule 50 by granting the  
10 motion for judgment as a matter of law with respect to  
11 the breach of contract argument that rests on  
12 Paragraph 15 of the lease. That is in favor of the  
13 defendant. There is no argument based on that. And I  
14 have deferred ruling on it for the time being.

15 All right. Any questions, Mr. Pierce or  
16 Mr. Porter, on that?

17 ATTORNEY PIERCE: No, your Honor.

18 ATTORNEY PORTER: No, sir.

19 THE COURT: And I did make some  
20 arrangements, but I understand you made your own  
21 arrangements and got the case. It isn't that case that  
22 I would rely on. It's the cases cited in there that I  
23 would find -- that I found probably point to the  
24 conclusion that in Virginia, there is an implied duty of  
25 good faith and fair dealing. It hasn't been stated in

1 quite the emphatic, affirmative way that one would hope  
2 and expect the Supreme Court to do one way or the other.

3 I'm old enough when I can remember that it  
4 was black letter law that there wasn't such a duty in  
5 Virginia, that the implied duty of good faith and fair  
6 dealing didn't exist.

7 Now we're in an age of some doubt about it  
8 and ambiguity about it. But I think on the whole, I'm  
9 prepared to recognize it here. But as I said, I have  
10 serious concerns under Rule 50 as to whether such an  
11 implied duty of good faith and fair dealing would ever  
12 require the circus to change the order of the show,  
13 because that would contradict the employment contract  
14 which clearly, I think, provides that -- or confers that  
15 duty and that power on the circus.

16 All right. Now, I'm going to take a recess.  
17 In about two minutes, I hope that a package of  
18 instructions will be presented to you. I want you to  
19 read those instructions quickly, and then I want you to  
20 confer, if you have objections with each other, to  
21 advise each other of the objections and the bases for  
22 those. And then I will reconvene -- I'll reconvene very  
23 quickly unless you need more time. You can tell  
24 Mr. Wood if you do. I intend to convene at about five  
25 minutes after 2:00. And then we'll proceed with your --

1 I'll deal with your objections, if you wish to add an  
2 instruction, subtract an instruction, or change.

3 Now, if you agree to a change, I'll ask for  
4 that first. Because I'm likely to acquiesce in any  
5 agreed change or revision. They're fairly  
6 straightforward. They're fairly simple. There's no  
7 dispute about whether the contracts exist or whether  
8 they're valid.

9 It's silly. Some of you submitted  
10 instructions on consideration. That's silly. We don't  
11 need anything like that. It just confuses matters. The  
12 sole question presented is whether the termination was  
13 for cause or not. And if I've omitted an instruction,  
14 you can provide it or you can argue for it.

15 And I have a jury verdict form as well,  
16 which I'll ask Mr. Wood to provide that to you as well  
17 when I recess.

18 All right. Court stands in recess for  
19 15 minutes, and I will have the instruction package  
20 brought out to you promptly.

21 (Court recessed at 1:48 p.m.)

22 (Court called to order at 2:00.)

23 THE COURT: Do you need a few more minutes?

24 ATTORNEY PORTER: It would be helpful, I  
25 think.

1                   THE COURT: Let me ask this: Do you have --  
2                   for the videos, do you have a copy of the videos on a  
3                   thumb drive or something?

4                   ATTORNEY PORTER: We have a copy of ours on  
5                   a thumb drive.

6                   Do you have a copy of yours?

7                   ATTORNEY PIERCE: I only have the full set.  
8                   I haven't deleted the ones that weren't admitted.

9                   THE COURT: All I want is the admitted  
10                  exhibits.

11                  Do you have a thumb drive or a copy of the  
12                  admitted exhibits?

13                  ATTORNEY PROCTOR: Would you like us to put  
14                  them on one together?

15                  THE COURT: I beg your pardon?

16                  ATTORNEY PORTER: We have ours on one thumb  
17                  drive. We can add his to ours and give you one thumb  
18                  drive.

19                  THE COURT: Is yours a separate exhibit,  
20                  Mr. Pierce?

21                  ATTORNEY PIERCE: They were separate, yes.

22                  THE COURT: What I want you to do -- can you  
23                  put them now on a thumb drive together, one thumb drive?

24                  ATTORNEY PORTER: Yes, sir.

25                  THE COURT: The gentleman right behind is

1           the expert who will take that thumb drive, and he will  
2       ensure that the jury has the proper machinery with which  
3       to watch it.

4           Now, are the exhibits denominated by number  
5       or anything on the thumb drive?

6           ATTORNEY PORTER: Yes, sir.

7           ATTORNEY PIERCE: Mine are.

8           THE COURT: Can you make sure yours is,  
9       too, Mr. Pierce?

10          ATTORNEY PIERCE: Mine are, yes.

11          THE COURT: Now, how do we ensure that -- I  
12       want to ensure that the only exhibits that the jury gets  
13       are the ones that I have actually admitted. I can't do  
14       that, neither can the deputy clerk. Counsel are the  
15       only -- you all are the only ones who can determine  
16       that. So when you give the thumb drive to --

17          Can you check it up here, Lance?

18          MR. BACHMAN: Yes. I can get the computer  
19       and meet you in chambers.

20          THE COURT: I will look at it, too. But I  
21       want you all to be able to confirm to me that what's on  
22       this single thumb drive with the numbers is all that's  
23       been admitted and something more. And give that -- you  
24       don't need to stay, I guess, Lance. Give it to Mr. --

25          MR. BACHMAN: I'll go get the laptop

1 computer.

2 MR. BACHMAN: Yes, sir.

3 THE COURT: And give it to Mr. Wood as  
4 quickly as you can.

5 MR. BACHMAN: Yes, sir.

6 THE COURT: How much time should we give,  
7 10, 15 minutes or what?

8 ATTORNEY PORTER: I think 10 minutes is  
9 fine.

10 THE COURT: All right. We'll reconvene for  
11 the instructions conference in 10 minutes and proceed.

12 Court stands in recess.

13 (Court recessed at 12:03 p.m.)

14 (Court called to order at 12:15 p.m.)

15 THE COURT: All right. Let's begin.

16 The instructions are in a package of three  
17 parts: Standard opening, standard closing, and  
18 substantive instructions. The standard opening  
19 instructions extend from Page 1. You'll see the numbers  
20 at the page at the bottom. 1 to -- through Page 21.

21 Now, let me ask to begin with, with respect  
22 to Pages 1 through 21, are there any agreed-upon  
23 changes?

24 ATTORNEY PORTER: The only question I have  
25 is on 8, you had some markings on the version you gave

1 us. I take it that that's coming out.

2 THE COURT: Well, wait a minute.

3 My question was are there any agreed-upon  
4 changes in 1 through 21?

5 ATTORNEY PIERCE: There are no agreed, and  
6 there are no issues with it either.

7 THE COURT: All right. Now, what was the  
8 writing on the bottom that you asked about?

9 ATTORNEY PORTER: On Page 8, the version we  
10 have has two brackets relating to stipulations.

11 THE COURT: Oh, all right.

12 Do you see those, Mr. Pierce --

13 ATTORNEY PIERCE: I did.

14 THE COURT: -- the ones that Mr. Porter is  
15 calling my attention to?

16 I had planned to omit those because there is  
17 no stipulation or judicial notice.

18 ATTORNEY PORTER: I thought that was the  
19 point that you were making. I wasn't sure it was clear.

20 THE COURT: There is.

21 Any objection to striking that, Mr. Pierce?

22 ATTORNEY PIERCE: No.

23 THE COURT: All right. Those will be  
24 stricken. Anything you can do to shorten it and clarify  
25 it.

1                   Now, we start with the substantive  
2 instructions which on 21 and extend through 2- -- or  
3 extend through 3- -- 33.

4                   ATTORNEY PORTER: 34.

5                   THE COURT: 33 or 34.

6                   Now, let's take that. First, are there any  
7 agreed-upon changes? And then I'll go and ask you  
8 whether there are any objections to what's included or  
9 what's omitted.

10                  ATTORNEY PORTER: I think the only  
11 agreed-upon change is the one to Page 25, material  
12 breach of contract.

13                  THE COURT: Yes.

14                  ATTORNEY PORTER: I think we both thought  
15 that that maybe didn't fit in well with the other  
16 instructions. There's no other reference to material  
17 breach in the instructions, I don't believe.

18                  THE COURT: All right. Where is it?

19                  Page what?

20                  ATTORNEY PORTER: 25.

21                  THE COURT: 25.

22                  And what are you asking?

23                  ATTORNEY PORTER: Material breach is not  
24 otherwise referenced in any of the instructions, so a  
25 definition of material breach might be confusing.

1                   THE COURT: I can strike "material."

2                   Is that what you're asking? That would make  
3 it --

4                   ATTORNEY PORTER: That would work.

5                   THE COURT: Any objection to striking  
6 "material," Mr. Pierce? That only benefits you.

7                   ATTORNEY PORTER: I mean, that was my  
8 original point with this. I don't think this applies,  
9 this instruction at all.

10                  THE COURT: Why not?

11                  ATTORNEY PORTER: Well, it's defining  
12 material breach.

13                  THE COURT: It's defining a breach.

14                  ATTORNEY PORTER: I think it's defining a  
15 material breach.

16                  THE COURT: That's what's at issue, is  
17 whether or not there's a breach. It seems to me I have  
18 to give an instruction on what is a breach. And I take  
19 your point about the word "material" not appearing  
20 anywhere else. Strike "material." And what is a breach  
21 of a contract? It's failing to do something the  
22 contract requires, isn't it?

23                  ATTORNEY PORTER: Yes, sir.

24                  THE COURT: Any objection to striking  
25 "material," Mr. Pierce?

1 ATTORNEY PIERCE: No, your Honor.

2 THE COURT: Mr. Porter, any objection to  
3 striking the word "material"?

4 ATTORNEY PORTER: Well, if we're going to  
5 use this instruction, I'd prefer the version you --

6 THE COURT: What instruction would you offer  
7 that defines what a breach is?

8 ATTORNEY PORTER: Well, I thought that some  
9 of the other instructions dealt with the contract  
10 itself, and I thought -- when I read it, I thought  
11 material breach was out of place.

12 THE COURT: Well, I'll strike the word  
13 "material." But now -- because I don't know where else  
14 a breach is defined. Can you point that to me? Because  
15 I certainly don't want to have repetitive instructions.  
16 But if you've got somewhere else where breach is  
17 defined, then I will pay attention to that.

18 ATTORNEY PORTER: I think that  
19 Instruction 23 defines the elements of the breach, and  
20 it would be my thought that that's sufficient without  
21 the definition of material breach.

22 THE COURT: The elements of a breach?  
23 That's what the title says. I'm not going to read them  
24 the title. But all it says is, "Did the defendant, by  
25 terminating plaintiffs, breach" -- that's really what --

1       the argument you're making is you don't need a  
2       definition of breach if -- I take it the parties can  
3       agree that termination without any cause would be a  
4       breach.

5                   ATTORNEY PORTER: Yes, sir.

6                   THE COURT: Well, I'm going to overrule your  
7       objection. I'm going to give the instruction as I have  
8       it omitting the word "material."

9                   Now, any other objections to the substantive  
10      instructions? Let's start with the first page. Any  
11      change on --

12                  ATTORNEY PORTER: 26, sir.

13                  THE COURT: 26.

14                  Anything before 26, Mr. Pierce?

15                  ATTORNEY PIERCE: Yes, your Honor. On  
16      Page 22 --

17                  THE COURT: Yes.

18                  ATTORNEY PIERCE: -- if this was merely  
19      intended to be a summary or overview --

20                  THE COURT: Yes.

21                  ATTORNEY PIERCE: -- then I don't have any  
22      objection.

23                  THE COURT: That's all it is.

24                  ATTORNEY PIERCE: Okay.

25                  THE COURT: I'm giving them a summary.

1                   ATTORNEY PORTER: I have an objection to 22  
2                   that also relates -- it's the same issue with 26, and  
3                   that's to the instruction -- it says, "A party to a  
4                   contract who prevents the other party from performing  
5                   his obligation under a contract has breached the  
6                   contract."

7                   THE COURT: Yes.

8                   ATTORNEY PORTER: That comes from the form  
9                   instruction in Virginia, but there's a big alert. And  
10                  we have the case here that goes with it that says that  
11                  if you're permitted to do such -- take such an action,  
12                  and here we're permitted to change the show order, it's  
13                  not a proper instruction.

14                  Have I articulated that well?

15                  THE COURT: Yes, you've said it. It's the  
16                  same thing I said about the Rule 50 motion.

17                  I think that's right.

18                  ATTORNEY PORTER: I have the case here that  
19                  stands for that proposition.

20                  THE COURT: Well, it's common sense.

21                  ATTORNEY PORTER: Right.

22                  THE COURT: It's common sense. And I  
23                  understand that. It's what I said; that if -- as I  
24                  concluded thus far, if the circus has the power, the  
25                  right under the contract to change the order, then

1                   impossibility doesn't -- there's no prevention that  
2                   comes into play, but that's wrapped up with the Rule 50  
3                   motion.

4                   ATTORNEY PORTER: Okay. My point on that is  
5                   I just think that it -- well, I think it's not the right  
6                   instruction for the jury. It's also cumulative in the  
7                   sense that it's in two places.

8                   THE COURT: Where is it in another place?

9                   ATTORNEY PORTER: It's in the summary of  
10                  facts.

11                  THE COURT: Yes, but that's just their  
12                  contention. Now I'm instructing them on the law. SO  
13                  it's not cumulative.

14                  ATTORNEY PORTER: Okay. Yes, sir.

15                  THE COURT: Let me just reiterate what I  
16                  said to be unmistakably clear.

17                  My difficulty with the Rule 50 motion  
18                  with -- the reason I have difficulty in granting it at  
19                  this time -- I may grant it ultimately -- I think it is  
20                  clear that the circus has the right to alter the order  
21                  of the acts, and it seems to me that put in the context  
22                  of this case, that means people have to accommodate that  
23                  new order.

24                  And here it seems there was evidence that  
25                  Cornbread couldn't do it. Get another horse. That's

1 what's required. There's no immutable law that says  
2 that a comedy act can't come when this comedy act was  
3 supposed to be put on.

4 So I'm not sure that impossibility is -- or  
5 that that does prevent employment. You know, there was  
6 another horse. They didn't produce him until late. He  
7 wasn't show-ready, as the testimony indicated. But as  
8 you would point out, Mr. Porter, you gave them time to  
9 make him show-ready.

10 In any event, your point is well-taken, but  
11 it goes to Rule 50. I agree with your point that it is  
12 the law of Virginia that if the contract permits an  
13 action, that action can't be relied upon as a basis for  
14 the party claiming that the action prevented  
15 performance.

16 Let me say beyond that. If, as I may  
17 ultimately conclude, the circus has the power under the  
18 contract to control the order of the show, then  
19 decisions it makes about the order and the artistic  
20 content, which is part of the order, that's what you  
21 have to do.

22 And there isn't any evidence that it  
23 couldn't be done. There was evidence that Cornbread  
24 wasn't able to do it very well, but there isn't any  
25 evidence that it couldn't be done. They weren't asking

1           the horse to jump over the moon or to recite Julius  
2           Caesar in Latin or something like that. There was  
3           really no -- no -- nothing that the circus required that  
4           rendered it impossible.

5                         What the instruction says is that they  
6           prevented them from performing the contract. Your point  
7           is, Mr. Porter, that if they have the right to do it  
8           under the contract, that can't be a basis for  
9           prevention. I agree with that, and that may be what I  
10          rule in Rule 50 at the end. But for now, I'm going to  
11          give it.

12                         ATTORNEY PORTER: Yes, sir.

13                         THE COURT: Mr. Pierce, do you have a view  
14          you want to express?

15                         ATTORNEY PIERCE: On that issue?

16                         THE COURT: Yes.

17                         ATTORNEY PIERCE: No. You're where I would  
18          want you to be, so I don't have anything to add to that,  
19          your Honor.

20                         THE COURT: Do you have anything to say  
21          about if you do get a verdict, it sounds like I might go  
22          the other way? But I'll give you a chance to address it  
23          at that time.

24                         ATTORNEY PIERCE: I would think that would  
25          be a good thing.

1                   THE COURT: But you're going to have to do  
2 it immediately.

3                   ATTORNEY PIERCE: Today, you mean?

4                   THE COURT: Whenever there's a verdict. If  
5 there's a verdict in favor of the plaintiffs, I'm going  
6 to rule on Rule 50 today.

7                   All right. Any other changes to the  
8 substantive instructions? What I did, Mr. Porter, was  
9 to overrule your objection to the instruction on  
10 Page 26. Your objection to the instruction on Page 26  
11 is that it's contrary to the evidence.

12                  ATTORNEY PORTER: Yes, sir.

13                  ATTORNEY PIERCE: Your Honor, I have one  
14 last one, and that's on Page 27.

15                  THE COURT: Yes.

16                  ATTORNEY PIERCE: The first sentence is  
17 fine. We -- I just want to reserve my objection. I  
18 don't believe --

19                  THE COURT: 27.

20                  ATTORNEY PIERCE: Page 27.

21                  THE COURT: All right. What's the  
22 objection.

23                  ATTORNEY PIERCE: The second sentence.

24                  THE COURT: What does it say? "If, on the  
25 other hand, you find plaintiff did not prove that

1 defendant breached the employment contract, it follows  
2 that defendant did not breach the lease."

3 ATTORNEY PIERCE: Right.

4 THE COURT: Really? What's the breach if he  
5 didn't -- if there -- aren't they tied together?  
6 There's no way that if he -- they don't have an  
7 obligation to continue doing all the things under the  
8 lease if they terminate them correctly?

9 ATTORNEY PIERCE: Well, maybe my issue is  
10 there's a matter of interpretation that goes into this.  
11 Because those two documents are coterminous, they need  
12 to be construed together. So saying that if there is no  
13 breach in the employment contract when they're going to  
14 be construed together, jointly, I think that may be  
15 where my issue is.

16 I don't think it necessarily follows, that  
17 second sentence, because they are to be construed  
18 together, and one has meaning with the other. They were  
19 issued at the same time. They were signed at the same  
20 time. There's no magical divide.

21 THE COURT: If there's no breach of the  
22 employment agreement, can there be a breach of the  
23 lease?

24 ATTORNEY PIERCE: I think there can, your  
25 Honor.

1                   THE COURT: No, there cannot.

2                   ATTORNEY PIERCE: I'll preserve my  
3 objection. I understood that's where you were going.

4                   THE COURT: Do you see any way if there's --  
5 if there isn't a breach of the employment contract, that  
6 there can be a breach of the lease?

7                   ATTORNEY PORTER: No, sir.

8                   THE COURT: Now, it is true, as Mr. Pierce  
9 points out, that they are to be read together; right?

10                  ATTORNEY PORTER: Well, there are two  
11 agreements that were signed at the same time, and  
12 there's language that, as you've highlighted, says that  
13 a breach of one is a breach of the other. I don't, by  
14 and large, dispute what you're saying.

15                  THE COURT: Let me ask you this: Suppose  
16 Mr. Pierce argues to the jury that, "Look, this  
17 paragraph in the lease," Paragraph 7C, I think it was,  
18 "suppose there's a" -- he argues there was a breach of  
19 the good faith and fair dealing with respect to that  
20 provision.

21                  Now, if they prove that, I don't see how the  
22 termination could conceivably have been warranted;  
23 right?

24                  ATTORNEY PORTER: Correct.

25                  THE COURT: So there would have to be a

1 violation of both, Mr. Pierce. There couldn't be a  
2 violation of the employment agreement without there also  
3 be -- without it also including the lease. And if you  
4 don't show that the employment agreement was violated,  
5 there can't be a violation of the lease.

6 If your argument somehow persuades the jury  
7 on Paragraph 7C, that means that the termination was not  
8 appropriate; right?

9 ATTORNEY PIERCE: Which is exactly where I  
10 intended to go and why I raised my objection.

11 THE COURT: And that would be a violation of  
12 the employment agreement, wouldn't it?

13 ATTORNEY PIERCE: I think so because they're  
14 coterminous. And as long as I can argue that --

15 THE COURT: "Coterminous" just means at the  
16 same time. I don't think coterminous really answers the  
17 question. They're inextricably intertwined.

18 ATTORNEY PIERCE: Agreed.

19 THE COURT: Any other objections that I  
20 should consider, Mr. -- let me ask Mr. Pierce first.  
21 Any other objections?

22 ATTORNEY PIERCE: I've made my points, your  
23 Honor. No.

24 ATTORNEY PORTER: No, sir.

25 THE COURT: All right. Now, we will have

1 the jury --

2 ATTORNEY PIERCE: Your Honor, I made a  
3 mistake, and I apologize. I just want to preserve that  
4 the point I just raised has consequences for the verdict  
5 sheet.

6 THE COURT: All right. Let's go to the  
7 verdict form.

8 What's your objection to the verdict form?

9 ATTORNEY PIERCE: In Question No. 1, I think  
10 the conjunctive "and" is problematic because I don't  
11 think I have to prove a breach of all three of those  
12 things.

13 THE COURT: Well, the contract and the  
14 addendum are together, the employment contract. They're  
15 one agreement. They're not two agreements. They're one  
16 agreement.

17 ATTORNEY PORTER: And the addendum wraps in  
18 the lease.

19 THE COURT: Right. So I don't see how -- if  
20 you prove that they breached that provision in the  
21 lease, which I am generously and perhaps mistakenly  
22 allowing you to argue, if you prove that, then the  
23 termination wasn't proper, was it?

24 ATTORNEY PIERCE: That's our position, yes.

25 THE COURT: So they are all together. It is

1 "and."

2 ATTORNEY PIERCE: I still think it's the  
3 disjunctive "or."

4 THE COURT: It can't be. It can't be.  
5 There can't be separate -- in other words, if you went  
6 to No. 2, if you found that there was a breach of the  
7 lease agreement, you didn't find there was a breach of  
8 the employment agreement, that wouldn't make any sense,  
9 would it?

10 ATTORNEY PIERCE: As to that piece of it,  
11 yes.

12 THE COURT: All right. Well, I think I  
13 understand your point maybe even a little better than  
14 you do. It doesn't matter whether it's conjunctive or  
15 disjunctive. The fact of the matter is that the  
16 argument you wish to make about 7C, if you prevail in  
17 that argument, it necessarily means that there has been  
18 a breach of the employment agreement.

19 ATTORNEY PIERCE: Okay.

20 THE COURT: And the employment agreement and  
21 the addendum are not separate agreements. It's one  
22 agreement. And as Mr. Porter pointed out, the addendum  
23 also wraps in the lease. They're all really one  
24 agreement.

25 All right. Anything else, Mr. Pierce?

1 ATTORNEY PIERCE: No, your Honor.

2 THE COURT: Mr. Porter.

3 ATTORNEY PORTER: No, sir.

4 THE COURT: All right. Now, have you  
5 provided Mr. Bachman with the --

6 MR. BACHMAN: Your Honor, they're in here  
7 now, the exhibits.

8 THE COURT: And so you're ready -- when the  
9 jury retires after I instruct them, can you take that in  
10 and --

11 MR. BACHMAN: Yes, I can take that in.

12 THE COURT: They're not required to listen  
13 to it or watch it, but they may do as they wish.

14 Now, I'm going to have the jury brought in.  
15 I will give you -- we'll move the podium, Mr. Wood.

16 MR. BACHMAN: Did you want to review the  
17 exhibits on the thumb drive, your Honor?

18 THE COURT: Have you all seen the thumb  
19 drive?

20 MR. BACHMAN: Defendant's Exhibit 81.  
21 Defendant's Exhibit 82.

22 THE COURT: The record reflect that we're  
23 all looking at it right now. And what I want to know  
24 from counsel is whether the thumb drive now makes --  
25 makes clear that Exhibits -- and they can select the

1           exhibit number and look at it. I don't need to see the  
2           actual exhibit.

3                         ATTORNEY PORTER: Yes from the defendant's  
4           side.

5                         (Conferring.)

6                         ATTORNEY PIERCE: I believe that to be the  
7           case.

8                         THE COURT: All right. Just for idle  
9           curiosity, pick one of them for me, would you, please,  
10           Mr. Bachman. Let's see what it looks like.

11                         MR. BACHMAN: (Complied).

12                         THE COURT: Enough. Now, I want you to do  
13           thing.

14                         MR. BACHMAN: Turn that down?

15                         THE COURT: Well, I don't think I admitted  
16           it, but I don't think we heard the audio.

17                         ATTORNEY PORTER: We did hear the audio for  
18           the altercation. We tried to get the audio to work, and  
19           we had a technical problem.

20                         THE COURT: Are the parties in agreement  
21           that the exhibits with the audio are admitted?

22                         ATTORNEY PORTER: Yes, sir.

23                         THE COURT: So when you take it inside to  
24           the jury room, Mr. Bachman, they can hear and see  
25           things, but you can show them how to turn it down.

1 MR. BACHMAN: Will do.

2 THE COURT: You all may think it's funny,  
3 but I would have difficulty even with instructions doing  
4 it.

5 MR. BACHMAN: Your Honor, may I just leave  
6 this here and have Teresa or somebody contact me and  
7 come back up?

8 THE COURT: Yes. You're excused.

9 The podium has been moved. And you've got  
10 about 20 minutes, each of you. You want to reserve  
11 about five for your rebuttal -- or you do.

12 ATTORNEY PIERCE: Yes.

13 THE COURT: You've got 15 and 5. Let's have  
14 the jury brought in.

15 (Jury impaneled at 2:37 p.m.)

16 THE COURT: All right. First, let me thank  
17 you for your patience.

18 Now we're ready to proceed with closing  
19 arguments. Closing arguments are not evidence, but  
20 they -- the lawyers are entitled to now summarize and  
21 interpret the evidence as they see it for you. If any  
22 difference should appear to you from what -- any  
23 difference between the evidence as they recall it and  
24 the evidence as you recall it, it is your recollection  
25 that controls.

1                   Also, the parties have been informed about  
2 the instructions, the rules of law that I will give to  
3 you following their instructions (sic). So they're not  
4 proceeding in ignorance of what I'm going to instruct  
5 you. And they're permitted to refer to it.

6                   But if any difference appears to you between  
7 what they say the law is and what I tell you the law is,  
8 then you must be guided by what the Court tells you is  
9 the law.

10                  Now, these arguments will be about -- no  
11 more than 20 minutes in length. The plaintiff has an  
12 opportunity to make the opening argument, plaintiffs do,  
13 because the plaintiffs have the burden of proof in this  
14 matter. And then the defendants will have their closing  
15 arguments. And then the plaintiffs have an opportunity  
16 for rebuttal because the plaintiffs have the burden of  
17 proof. And the rebuttal will be very brief, whatever is  
18 left over of the 20 minutes.

19                  And following that, I will give you  
20 instructions on the law, which should take me about  
21 20 minutes. And then you'll be permitted to retire and  
22 deliberate on your verdict.

23                  Thank you for your patience and your  
24 attention.

25                  Mr. Pierce, are you ready to make your

1 closing argument?

2 ATTORNEY PIERCE: I am, your Honor.

3 THE COURT: All right. You may proceed.

4 ATTORNEY PIERCE: Thank you, your Honor.

5 Good afternoon, and thank you so much for  
6 all the careful attention that you've spent and taken  
7 out of your lives for the past three days. We know your  
8 time is valuable, and we very much appreciate that  
9 you've been here.

10 Let me make a comment about my clients. My  
11 clients are who they are. They are real people, regular  
12 people. They work hard. They're fiery. They're  
13 passionate. They're colorful. They fight for --

14 THE COURT: Your opinion about your clients  
15 is not appropriate.

16 ATTORNEY PIERCE: They're the types of  
17 individuals who stand up for their animals. And this  
18 case will ultimately turn on, I suggest, three basic  
19 things: Your word is your bond, do what you say, and  
20 actions speak louder than words. And I'll come back to  
21 those.

22 In this case, as you will hear from the  
23 judge shortly, we're proceeding under a breach of  
24 contract; that we had an employment agreement, and with  
25 that was a lease. And in that document are certain

1       things. And you're going to have a chance to go through  
2       that in a while.

3                     But the parts of it that are especially  
4       important and I will highlight for you, Paragraph 14 of  
5       the employment agreement contains multiple provisions  
6       related to safety, related to discipline, related to  
7       termination. And in the various subparagraphs  
8       associated with Paragraph 14, you will see a number of  
9       things that are important.

10                  For example, we can be disciplined,  
11       terminated if animal safety is not of the utmost  
12       importance to us. We can be terminated if we fail to  
13       report our concerns with animal safety. We can be  
14       terminated if animal safety is not treated as a  
15       paramount concern or if we fail to treat animal safety  
16       with utmost importance. And that we must control animal  
17       safety or animal conduct in order to avoid animal or  
18       staff safety issues. Over and over again. Starts in  
19       Paragraph 14, and then it continues again in  
20       Paragraph 16 in the employment agreement.

21                  The second document, the lease, which was  
22       signed --

23                  THE COURT: I think you'd also -- there is  
24       an addendum, and it revises Paragraph 14. So you need  
25       to know that.

1                   Next question -- or next argument. You may  
2 proceed.

3                   ATTORNEY PIERCE: In the lease, there are  
4 some additional paragraphs that I want to highlight to  
5 you, Paragraph 7B and Paragraph 7C.

6                   Paragraph 7B begins by setting the stage  
7 saying that staff and animal safety is paramount to both  
8 parties, but it ends with a very important phrase. It  
9 indicates in that final phrase that the Ringling company  
10 will work with my clients in order to promote safety  
11 compliance.

12                  So in that paragraph, it lays out certain  
13 obligations. And it very importantly ends by saying  
14 they'll work with us in order to be able to accomplish  
15 what those safety objectives are.

16                  THE COURT: Although this wasn't brought  
17 out, so that you're clear about this, ladies and  
18 gentlemen, "lessors" means the plaintiffs. "Lessee"  
19 means the circus. In other words, they're leasing the  
20 animals.

21                  ATTORNEY PIERCE: And you will see in  
22 Paragraph 9 of the lease there's a final reference that,  
23 once again, we can be terminated if we fail to provide  
24 for appropriate animal safety.

25                  In the addendum, as your Honor has

1 indicated, we see again a probationary period reference,  
2 and we see a termination in Paragraph 8 of the addendum.  
3 And it's in hopeless conflict. It says in Paragraph 8  
4 that they can terminate us if we disrupt the creative  
5 element or if we fail to abide by the safety  
6 requirements in Paragraph 14. Can't have it both ways.  
7 This case has brought that home. Some times are going  
8 to conflict. But yet in Paragraph 8, as they drafted it  
9 and submitted it to us, that's how it stands. They can  
10 terminate us one or the other.

11 Now, let me talk now about the breach in  
12 this case and what it is that Ringling did wrong and why  
13 they failed to allow their word to be their bond and,  
14 more specifically, how is it that they did or did not  
15 work with us in order to maintain safety as the utmost  
16 concern for both of us, for the Donnerts and for the  
17 Ringling organization.

18 Well, in this case, we have an animal,  
19 Cornbread, who has exhibited during a fairly short  
20 period of time a dramatic change in his behavior. He  
21 went from being just fine -- everybody agrees that  
22 everything was just fine -- the show order changes, and  
23 pretty much overnight all these consequences start  
24 flowing. And you heard lots of testimony about signs of  
25 fear, how Cornbread began to exhibit these signs, and it

1 was increasing during even that short period of time.  
2 He was exhibiting them in an even stronger way so that  
3 by the time we get to December 28th, you will have  
4 available for your review the videos that were displayed  
5 either partially or fully earlier.

6 But in the December 28th video -- that's  
7 Plaintiffs' Exhibit 7P -- Cornbread defecated four times  
8 during that filming, during that video, and stood up at  
9 least three times.

10 THE COURT: Do you have an objection?

11 ATTORNEY PORTER: Yes, sir. I think this is  
12 his interpretation of the video. I think it's up to the  
13 jury to make this determination for themselves.

14 THE COURT: All right. Go on.

15 ATTORNEY PIERCE: And the point being that  
16 he's demonstrating fear. And what does a fearful animal  
17 do? What does a fearful horse do? Well, according to  
18 Mr. Stipka, they take off running. What is the  
19 consequence of that? You saw on the videos they can --  
20 there's people out there. There's wiring out there.  
21 There's open portals. There are entryways where the  
22 public goes.

23 If that horse takes off running, somebody's  
24 going to have a consequence. If he gets off the edge of  
25 the mat, as you go around the concrete that you can see,

1           that's a slip hazard. If that horse takes off running,  
2           there will be consequences associated with that and  
3           safety concerns.

4                         Furthermore, a horse that's fearful can  
5           knock people down. They can roll over them. Cornbread  
6           can take his 2,000-pound body and roll over the top of  
7           David while he's there on the ground next to him. He  
8           can bite, kick, trample, on and on. Those are very real  
9           concerns.

10                  If safety truly is say what you mean, if  
11           safety truly is the utmost concern, we don't need to  
12           wait for an accident. When David Donnert told you this  
13           was an accident waiting to happen, we don't need to wait  
14           for the accident. We need to be able to identify,  
15           interceded, take appropriate action before it becomes a  
16           problem.

17                  So what did we do? We reported it to the  
18           company, to multiple individuals: Mr. Murillo, Nicole  
19           Feld, David Kiser. David Kiser, very interestingly,  
20           talks about having received reports several times a day  
21           from the Donnerts. It was an ongoing issue. But yet  
22           when you contrast that with the owner, Nicole Feld, the  
23           only thing that she was prepared to testify or  
24           acknowledge was when Robi came and got in her face,  
25           basically, and confronted her during the preshow.

1                   But it was an ongoing concern, reporting it  
2                   to Alice Vargas, the animal superintendent, Jessica  
3                   Hyman, the veterinarian assistant, having a discussion  
4                   with Tabayara Maluenda. Lots of folks were brought in  
5                   on this.

6                   And if there there's anything that you can  
7                   conclude regarding the Donnerts, they're not bashful.  
8                   They're going to make their point of view known. Yet we  
9                   have this hear no evil, see no evil. "Well, it was no  
10                  big deal. There wasn't even a safety concern. No  
11                  problem whatsoever."

12                  We proceeded as we saw necessary. We  
13                  reached out to individuals in the industry that we  
14                  regarded as experienced and knowledgeable, tried to  
15                  benefit from their suggestions. We took the steps that  
16                  we could, training issues, acclimation issues, Vicks  
17                  VapoRub, Fabuloso in the carpet. But it wasn't solving  
18                  the problem. The problem was actually getting worse.

19                  And now we reach a point where Cornbread  
20                  actually sustains an injury as a result of this. He  
21                  comes up out of there and winds up stepping on David's  
22                  thigh as a result of trying to get up prematurely before  
23                  David had released him. This was a very real safety  
24                  concern. And Bear Claw, the replacement horse,  
25                  demonstrates essentially the same conduct, the same

1                   anxiety when he's placed in the same situation.

2                   Now, even though the are on notice, what is  
3                   it that the Feld individuals do? Well, they don't reach  
4                   out to a qualified trainer. They don't do an  
5                   investigation. They don't even have a qualified trainer  
6                   on staff. They don't get any expert input. And for a  
7                   sophisticated company, they don't even have any  
8                   documentation. They weren't talking with the Donnerts.  
9                   They weren't saying, "Hey, where are we going? We want  
10                  to counsel you on this." They got nothing.

11                  In fact, the only documentation in this case  
12                  was written by Robi Donnert. The only documentation in  
13                  this case is the e-mail that he bothered to send on  
14                  January the 3rd. It happened. It's real. There are  
15                  some very important phrases that are embedded in this  
16                  e-mail. And it may not be the easiest paragraph to read  
17                  but there are statements in there that are very  
18                  important.

19                  He talks about how he had now received a  
20                  document from the SurgiCare clinic where Cornbread had  
21                  gone, and he's indicating, "We hope that your veterinary  
22                  staff is going to brief you, bring you up to date on  
23                  what's happening."

24                  You also heard David Donnert saying that he  
25                  had turned over a copy of that same document to Jessica

1 Hyman, the veterinarian assistant. So it's in their  
2 hands, and they're aware of it. It goes on from there  
3 to say some additional very important things.

4 "This is not safe. Our animals are going to  
5 get hurt. We need to do something. Please work with  
6 us," which is exactly what Paragraph 7C says that they  
7 were going to do, that they were going to work with us.

8 When you read this e-mail, is safety  
9 paramount in Robi's mind? Is that what's driving him to  
10 send that? Is that the concern that he's acting out on?

11 Even after he sends that to the owner,  
12 Nicole Feld, how does Ringling respond? They don't  
13 consult with anybody. They don't have an investigation.  
14 They don't have any more documentation. How would you  
15 respond? How would a reasonable person respond as an  
16 employer?

17 THE COURT: Did you say, "How would you  
18 respond?"

19 ATTORNEY PIERCE: I tried to retract that.

20 THE COURT: That is an improper argument.  
21 It is stricken.

22 ATTORNEY PIERCE: You're correct, your  
23 Honor.

24 THE COURT: I know I'm correct.

25 ATTORNEY PIERCE: I tried to rephrase that

1 on the draw.

2                   How would a reasonable person respond under  
3 those circumstances? An employee has come in and says,  
4 "I have a safety concern." Nicole Feld's response was  
5 to immediately fire off two e-mails on the safety issue  
6 to the company lawyer. Why? What do those actions say?  
7 How do they speak louder than words. She never actually  
8 responded to us. That was the last contact between  
9 them.

10                  She sends those two e-mails, and the next  
11 day the Donnerts are disinvented from showing up to the  
12 photography session. A promotional brochure is going to  
13 be prepared that they would have been in if they were  
14 going to be part of the act on a go-forward basis.  
15 They're disinvented. They're not in there. The  
16 handwriting is on the wall. The decision's been made.

17                  We also noted Vinicio Murillo is also  
18 sending e-mails back and forth with the company lawyer  
19 before meeting with us. The handwriting is on the wall.

20                  Did they listen to our concerns? No. And  
21 the reason why they didn't listen to our concerns, the  
22 reason why they didn't reach out and ask us to come in  
23 and talk to us is because they already knew what our  
24 concerns were. We'd already been telling them for 10 or  
25 12 or 14 days what the concerns were. They already knew

1           them, and they already knew the severity or the extent  
2           to which they were taken.

3                         And their version is they wanted a meeting  
4           to determine our intentions, not to address the safety  
5           concern, which we had just -- the only piece of  
6           documentation that occurred is that e-mail. We had  
7           documented safety concerns, and that wasn't even the  
8           purpose of the meeting. The purpose of the meeting was  
9           to find out what our intentions were.

10                  And miraculously, the contents of that  
11           e-mail, according to them, never even came up. We sent  
12           it out less than 24 hours earlier. And the status of  
13           Cornbread, what the discharge summary said, what was  
14           going on with safety concerns, according to them, none  
15           of that came up. But it was the hot news 24 hours  
16           earlier that led to the series of e-mails to the company  
17           lawyer, but it doesn't even come up in the conversation?

18                  The options that they wind up presenting are  
19           so poorly explained, they don't even bother to say,  
20           "Hey, we're going to give you unlimited training time on  
21           the company dime. We're going to allow you to do your  
22           job." They don't bother to say that. Does that make  
23           sense?

24                  And why would anyone in their right mind  
25           walk away from unlimited training on a company dime to

1 learn your job? Why? Doesn't make any sense. Doesn't  
2 make any sense to Mr. Murillo either, but yet he didn't  
3 say anything. He didn't say -- grab them by the ear,  
4 "Guys, what are you doing? Why are you walking away  
5 from this sweetheart deal?" And the reason why he  
6 didn't do that is because it was never offered to them.

7                   And watch the disagreement between David  
8 Kiser and Mr. Murillo. According to David Kiser and  
9 Mr. Murillo, our response was either we wanted to be  
10 bought out -- that's one of them -- and the other one  
11 says, "No, we want to go back to the gold unit." So  
12 they can't even agree on what it is that they say we  
13 were presenting to them as part of our position.

14                   And Mr. Murillo says he was surprised that  
15 we turned down that option, unlimited training on the  
16 company dime. He didn't do anything about it. He  
17 didn't ask for -- ask them to take action or think about  
18 it. He said, "No. Enough is enough."

19                   Was that working with us? Was that -- under  
20 their own version, under their own testimony, had they  
21 fulfilled their responsibilities? Is their word their  
22 bond? Are they working with us to address the safety  
23 concern?

24                   Now, you will hear shortly a jury  
25 instruction that will talk about the significance of

1 preventing one party from being able to perform its  
2 obligations. And in this case, the Donnerts had to make  
3 a choice. They had what amounted to a Hobson's choice.  
4 It was a no-win situation for them. They had to choose  
5 between keeping their animal from getting hurt, which  
6 they regarded as a matter of time, and abiding by the  
7 employer's instructions for how to proceed.

8 How are you going reconcile them? They  
9 couldn't even reconcile it because Paragraph 8 puts  
10 those two notions in conflict in the addendum. Still,  
11 we never got an explanation. We never got documentation  
12 as to how the process was firing. Rather, we were fired  
13 abruptly without any further significant discussion.  
14 Does that sound like a company that's working with  
15 somebody as they promised that they would do?

16 And their version is, "Well, we just wanted  
17 to get away. We just wanted to walk."

18 Why would we want to do that? Tiffany had  
19 now joined her husband Robi as part of the show. It was  
20 a significant contract. They had an abiding interest in  
21 establishing a relationship with the Ringling folks.  
22 And --

23 THE COURT: You're at 18 minutes.

24 ATTORNEY PIERCE: Thank you, your Honor.

25 With that being said, let me just see if I

1 can preserve just a little bit.

2 They are the ones who dwelled on why is it  
3 that we were trying to get away. That wasn't our case.  
4 Our case was, "You didn't do what you said you would  
5 do." They are the ones who spent all the time talking  
6 about whether or not we had tired.

7 So is this a case where safety is about  
8 utmost importance or is it a case of safety unless it's  
9 utmost importance until it's inconvenient.

10 For damages, I'll reserve what little time I  
11 have left, and I'll talk about damages shortly.

12 THE COURT: No, you don't have that option.  
13 Anything that you don't mention in your argument they  
14 don't have to respond to.

15 ATTORNEY PIERCE: Under the contract, \$700 a  
16 week for 96 weeks for two people is a little over  
17 \$134,000. Under the rental agreement, \$600, 96 weeks,  
18 two people is a little over \$115,000.

19 And these -- I'll rest with that, your  
20 Honor.

21 THE COURT: All right. Well, you've used  
22 your 20 minutes, but I'll allow you a couple of minutes.  
23 But this will give you two extra minutes, Mr. Porter.

24 You may proceed.

25 ATTORNEY PORTER: Thank you, sir.

1                   Good afternoon, and thank you for your  
2                   attention over these last three days. I know sometimes  
3                   it gets long in here with the lawyers, and we do  
4                   appreciate your time. And on behalf of me and my  
5                   colleague Laurie Proctor, Vinicio Murillo, and the Feld  
6                   organization, we do really thank you for your time and  
7                   attention. As Judge Ellis says, public service is one  
8                   of the most important things you can do, and we do thank  
9                   you.

10                  When we started this three days ago, we  
11                  talked about safety. We talked about safety, that their  
12                  claim is that this is all about safety. But you heard  
13                  during the evidence over the last three days that there  
14                  are lots of other reasons why something like this could  
15                  have happened.

16                  Now, why are they going to safety? Well, I  
17                  submit to you that safety is the hook here. Because if  
18                  you look at the contracts, there's no basis for any  
19                  other argument for them to make. The contracts are  
20                  clear. And I want to talk about the contracts.

21                  I told you at the beginning that you'd get  
22                  an opportunity to see the contracts in this case, and  
23                  you will when you go back into the jury room. You look  
24                  at the contracts. They're Plaintiffs' Exhibit 27, 28,  
25                  and 39. The first one, the employment contract,

1 Paragraph 11 speaks to the fact that the employees have  
2 to work under the supervision, direction, and control of  
3 the employer. 1A says that they have to work as  
4 directed by the employer. 1B talks about how they have  
5 the sole discretion to move these employees around.

6 If you move to the lease, it also in  
7 Paragraph 2A says that they have to act in a manner as  
8 lessee determines in the show. And as Judge Ellis  
9 mentioned, sometimes there's some confusion in the lease  
10 because the lessors are the Donnerts. They're the ones  
11 who are leasing the animals to Feld. Feld is the  
12 lessee.

13 And then if you look at the addendum, that's  
14 the third piece of the puzzle. It's clear when it says  
15 that if the employee fails to perform in a first-class  
16 professional manner or disrupts or impedes or violates  
17 the employer's instruction, they can be terminated.

18 So these documents make it plain that Feld  
19 had the right to terminate these folks for cause. So  
20 the plaintiffs searched these documents, scoured the  
21 documents because they have to find something upon which  
22 they can base this claim that they had justification not  
23 to do their job.

24 We'll talk about the evidence on that in a  
25 minute. But what they point to is this Section 7C of

1           the lease. And they look at 7C and they see there's a  
2           safety obligation. We had these obligations to report  
3           the safety issues.

4                 Now, Feld was the first one to tell you that  
5           they were interested in safety concerns. Safety  
6           concerns were important to them. They want to hear  
7           about safety concerns. But look at the provision that  
8           these plaintiffs are relying on.

9                 If you read the provision and you look at  
10          the whole paragraph, not the little sound bites they'd  
11          like you to take out of there, you'll see that what it  
12          talks about is complying with federal laws and  
13          regulations and that Feld will help them comply with any  
14          federal laws or regulations with respect to safety that  
15          they have to maintain as animal owners. That's not what  
16          they're saying here. They're saying something  
17          different. They're stretching, stretching what the  
18          safety issue is.

19                 The important point for you all to think  
20          about when you go back into that jury room, because it's  
21          their burden to prove that Feld somehow breached this  
22          contract, is what did Feld do that was wrongful? What  
23          did Feld do that was wrongful?

24                 Well, I submit to you that if you look at  
25          the evidence here and you look at the evidence about how

1           Feld felt about these plaintiffs, what was the evidence?  
2           The evidence is they found them. They liked their act.  
3           They brought them to the gold unit. They thought they  
4           did really well on the gold unit.

5                         As a result, they wanted to take them to the  
6           red unit, which was a bigger production. They were  
7           interested in these people. They wanted them around.  
8           They paid them more money to go to the red unit even  
9           though contractually they weren't required to. When  
10          they got to the red unit, they put them in the center  
11          ring. That's a big deal to performers.

12                       They also took the comedy act. It wasn't  
13          just a one-act performance like it was in the gold unit.  
14          It was a common thread or theme through the entire show.  
15          Feld wanted these folks around. And when the plaintiffs  
16          said, "We're not going to perform," what did Feld do?

17                       They said, "Well, let's try and work through  
18          this. Let's come up with some options to make this  
19          work." Rejected. What did Mr. Kiser say after they had  
20          left? The show was not as good without the Donnerts.  
21          They wanted these people there. What did Feld do that  
22          was wrongful?

23                       Now take a look at it from the Donnerts'  
24          perspective. What was the evidence about what they  
25          thought of Feld? Well, they came to the gold unit. It

1 seemed like they were happy there. They were told about  
2 the move, and they said, "We don't want to go. We have  
3 friends here. We like it here. It's a smaller  
4 environment. It's friendlier, less work, fewer  
5 performances. You don't have to travel as far. We  
6 don't want to go anywhere. We have our own horse  
7 compound here. We don't have to relate to other people.  
8 There's not as much management. We don't like that so  
9 much."

10 So Mr. Murillo comes to talk to them. They  
11 blow him off. Comes again. "We're not leaving." He  
12 says, "Even if you make me leave" -- this is what Robi  
13 Donnert testified. He said, "Even if you make me leave,  
14 I'm going to go there. I'm going to present this act.  
15 I'm not training the horses. I'm not doing anything."

16 You know, they're in an employment  
17 situation. Is that an appropriate way for an employee  
18 to talk to an employer? What does Feld do? They work  
19 with them. They give them more money. They bring the  
20 wife onboard. They do as much as they can to make this  
21 work.

22 So then they come to the red unit. Were  
23 they happy to be there? Remember David's testimony?  
24 "We drove all night. They weren't even ready for us."  
25 Immediately, he starts having disagreements with the

1 producer.

2 You'll see the video that will be back there  
3 with you. You'll have a chance to take a look at it.  
4 What does he say? "I don't even want to be here  
5 anymore." This is before the show order had even  
6 changed. Remember what he said about being on the red  
7 unit? You know, it's sort of a big deal. "I don't  
8 care. I've seen better."

9 The show order changed. They never even  
10 tried before they started complaining. Never even  
11 tried. Again, was Feld acting wrongfully or was it the  
12 Donnerts? Put it into a more typical context, an  
13 employment context, not the circus environment. Say an  
14 employee is working in a small satellite office of a  
15 corporation. They get reassigned to a bigger office.  
16 Could that employee just say, "I'm not going" and expect  
17 to keep their job?

18 If an employee was assigned a project, could  
19 they just say, "I'm not going to do that. No way."  
20 Feld kept working with them. Feld kept working with  
21 them. Again, back to the 7C, this lease provision that  
22 they're relying on when they say that Feld agreed to  
23 work with the lessors in some way. You judge the  
24 evidence. You look at what happened here.

25 Did Feld try and help these people? Did

1           they pay they more money? Did they give them what they  
2           wanted? When they decided they wanted to leave, did  
3           they give them options that seemed to make sense?

4                         There's one thing about these option that's  
5           interesting here, is no one disagrees what the options  
6           were. The only somewhat issue of dispute is the length  
7           of the training, whether or not they were going to get  
8           two months.

9                         Okay. Well, there's no Hobson's choice  
10          here. Mr. Pierce says, "It's a Hobson's choice. We  
11          either have to do something that's unsafe or we have to  
12          leave." I submit that there's a third option. They  
13          could try. They could try. Feld's giving them the  
14          opportunity to have practice time.

15                         Now, whether it was two months -- and we  
16          submit that it wasn't -- the testimony on that was, "We  
17          didn't think it would take that long. We thought they'd  
18          take this offer. We thought they'd work with us. We  
19          wanted them around. And so long as it was progressing  
20          and they were doing well, we'd keep working together."

21                         There's no Hobson's choice. They didn't  
22          try. They said, "No. Change the show order or we ain't  
23          working." Is that an appropriate thing for an employee  
24          to do?

25                         Now, let's talk about the safety issue

1 again. And again, just because they say it's a safety  
2 issue doesn't make it one. What did Feld say? They  
3 said, "We saw what happened. We observed what was on  
4 the floor. We saw that Cornbread was having trouble.  
5 We don't dispute that Cornbread had some trouble. We  
6 dispute whether it was a safety issue or not."

7 And when you're back in that jury room, you  
8 can see those videos. You can take a look at them and  
9 you can decide whether or not there was any sort of a  
10 safety issue.

11 You heard a lot of, "Well, maybe there could  
12 be a trampling. Maybe the horse could run away. Maybe  
13 it could bite, it could kick, it could scream, it could  
14 do all sorts of things." Was there any evidence at all  
15 that anything like that ever happened? No.

16 If you look at the videos, the first one  
17 that you'll see -- I think it's Defendant's 82. This is  
18 the one that comes right after the show order had  
19 changed. And that's the one where the lights are one.  
20 That's an important one to look at because it gives you  
21 a sense of what's going on on the whole floor while this  
22 act is being presented.

23 And I submit what you'll see is you'll see  
24 the horse coming in. You'll see the tigers leaving.  
25 You'll see the cage going up, and you'll see the horse

1 coming out and starting to perform. Remember, that's  
2 the Donnert 2 part. That was always there. That was  
3 always part of the act.

4 The cages are up. The horse continues on to  
5 the comedy act. You'll see people sweeping the floor,  
6 and then gone. Minutes go by. Minutes go by. Minutes  
7 go by. The horse is doing fine.

8 What happens on that very first performance  
9 after the show order is changed? He laid down just  
10 fine. I asked David. I said, "How's he doing? How'd  
11 he do on that?"

12 He said, "He's doing pretty good." Very  
13 first performance after the show order had changed. We  
14 showed the second video. That was two days later. This  
15 one was done with the lights down. I asked him, "How  
16 did it go?"

17 "He looked pretty good." This is two  
18 performances after the show order had changed.

19 Now, did Cornbread start having some  
20 problems? Perhaps he did. Were there other reasons for  
21 it? He hadn't performed in a long time. New  
22 environment. There was some testimony that he was  
23 injured. He had also had some problems before lying  
24 down on the floor.

25 Remember, the very first time the Donnerts

1           worked with this horse back in Fort Myers when they  
2           bought the act from someone else, they couldn't get the  
3           horse to lay down. Is that a safety issue that we see  
4           here? I submit to you that it's not.

5                         And the issue of the noise itself, you'll  
6           recall the testimony about what happened at the gold  
7           unit. Cornbread's act followed a motorcycle act. A  
8           motorcycle act. Vroom, vroom. A motorcycle act. What  
9           did David say he did? He said he took the horse over,  
10          he got the horse used to the motorcycle, and the horse  
11          performed fine.

12                       What was the evidence of what David did to  
13          acclimate the horse in this case when he got to the red  
14          unit? Nothing. Nothing. He said it wasn't worth his  
15          time to practice. Didn't do it. Did he take the horse  
16          over with the cage going up and down? Did you hear any  
17          evidence that he tried to do anything like that?  
18          Nothing. He didn't try. Didn't want to be there.

19                       The issue with the tigers on the floor and  
20          the scent of the tigers, now initially there's been --  
21          there were some questions or some testimony about the  
22          horses and the tigers being together. You probably  
23          heard more of that than you ever cared to hear. But one  
24          thing is perfectly clear. These horses and tigers were  
25          never together. The tigers are out; the horse was in.

1                   Now, what did Robi say? He said, "I cured  
2                   that problem. I used the Vicks. I had no trouble."  
3                   And the dispositive point on that is the one time, the  
4                   one time, when they articulate this safety issue -- they  
5                   didn't do it at all in winter quarters when they were  
6                   down there. Remember, Robi testified that Nicole gave  
7                   him his (sic) card and said, "Call me or send me an  
8                   e-mail any time you have any trouble." Were there any  
9                   e-mails? No. He knew how to reach her. He had sent  
10                  her plenty of e-mails before.

11                  He sends one after winter quarters. What's  
12                  the issue that he raises? Anything about tiger scent?  
13                  No, you won't find it there. It's the sound of the cage  
14                  strike. This is a horse that got used to performing  
15                  after a motorcycle.

16                  Another thing I'd ask you to take a look at  
17                  when you view these videos is look at what's going on in  
18                  the background. I agree with Mr. Pierce that some of  
19                  these videos are hard to see. They get washed out a  
20                  little bit with the lights. But you can see in the  
21                  shadows what's happening.

22                  But the other thing that you can see is look  
23                  around at the people who are watching. There's some  
24                  stage crew people down there. No one is concerned about  
25                  anything that's happening on the floor that looks

1 dangerous. If there was a safety issue, if there was a  
2 biting or a trampling or a stomping or running away, do  
3 you think someone would react perhaps? I think so.

4 The other thing is David never stopped any  
5 show and said, "We've got a problem here. Look, this is  
6 what's happening. Look at this safety issue." It just  
7 didn't happen. Feld was doing everything it could to  
8 resolve the problems. They raised the issue of the  
9 tiger cage strike. They tried to solve it. They raised  
10 the issue of the scent. Robi said he solved it.

11 Feld's position on this was that there was  
12 no safety issue. This was a reacclimation issue or it  
13 was a retraining issue. And Feld was willing to give  
14 the Donnerts time to do this. These are animals. These  
15 are circus animals. They're not robots. They're not  
16 going to do the same thing every single time. And  
17 issues are going to come up during the course of a  
18 performance.

19 You know, these animals -- and Cornbread was  
20 a -- he had been performing in circuses for a long time.  
21 He had been with Feld for a period of time. And I  
22 submit that when you go to a circus, it's not like a  
23 symphony; right? These horses are performing on a floor  
24 with children eating ice cones and waving around things  
25 with lights and the like. He never had any trouble. He

1 performed just fine.

2 So that begs the question why did they want  
3 to leave? Why didn't they take the options? Feld can't  
4 tell you why they didn't take the options. They can  
5 tell you that they were there. The Donnerts agree that  
6 the options were what they were.

7 Well, they didn't like it on the red unit.  
8 They wanted to go back to gold. And what happened on  
9 the gold unit when they didn't get their way? They  
10 pushed. They pushed. They pushed. They held out.  
11 They fought. It took Mr. Murillo two and a half months  
12 before he could get them in a room.

13 When he finally got them in a room, they  
14 avoided him. They finally worked out a deal. I submit  
15 that's what was going on here. "If we push and we push  
16 and we push and we fight and we fight and fight, we're  
17 going to get what we want. Back to gold. That's what  
18 we want. That's where we want to be."

19 These Donnerts weren't fired. There was  
20 never a threat of any firing. Feld just asked that they  
21 try. They worked with them at every stage to try and  
22 get these folk to perform. They came up with options  
23 that are reasonable, that were appropriate, that would  
24 have solved the issue and allow the performance to go  
25 on.

1                   Feld had no choice but to fire these people  
2 for cause at the end. They would not perform. They  
3 would not act as directed. And I ask that you enter a  
4 verdict in favor of the defendant.

5                   THE COURT: All right. Mr. Pierce, you have  
6 just a couple of minutes.

7                   ATTORNEY PIERCE: I appreciate that, your  
8 Honor, and I will attempt to comply.

9                   THE COURT: You will comply.

10                  ATTORNEY PIERCE: Yes.

11                  THE COURT: I will ensure that.

12                  But go ahead, sir.

13                  ATTORNEY PIERCE: Thank you.

14                  Robi Donnert said that when he came to that  
15 meeting on January 4th, Vinicio looked him in the eye  
16 and said, "The Felds are tired of you." That's how they  
17 acted as well. This was very abrupt, very precipitous.  
18 And where did it leave Feld? It left Feld with a \$3400  
19 windfall because the Donnerts collectively represented  
20 \$3400 in overhead to them that they no longer had to pay  
21 for. The salaries for three individuals were  
22 immediately resolved for them.

23                  Now, a couple of the highlights I want to  
24 mention to you, the judge is going to talk to you about  
25 their responsibility to proceed in good faith, to carry

1 out their responsibilities under the contract. And  
2 that's why I spent the time that I did, because I want  
3 you to appreciate that contracts have significance.  
4 They have consequences.

5 And one of them is that you have to do what  
6 you say you're going to do, and you have to really try.  
7 You have to show good faith to do that. And in this  
8 case, why is it when Mr. Porter says, "There was a third  
9 option. They could have tried," what they were told  
10 was, "You have two months."

11 "Well, what if we can't get the job done in  
12 two months?"

13 "You're done."

14 They knew that there was no way, just like  
15 Mr. Stipka could not guarantee a result. And they  
16 walked away from there thinking that the discussion was  
17 continuing. They didn't resolve -- they didn't think  
18 that this discussion was over. They understood from  
19 Mr. Murillo that there was going to be attempt to reach  
20 out to a third party, and they were actually still  
21 waiting for that discussion to move forward so that they  
22 could have additional input from someone who would be  
23 respected by both sides and give them the benefit of  
24 whatever additional insight they might have.

25 THE COURT: Bring it to an end.

1                   ATTORNEY PIERCE: Okay. So this was not a  
2 situation where we thought that we were going to just  
3 pack it up and walk away. This was a situation where we  
4 were still, even to the end, attempting to work with  
5 them.

6                   Thank you very much.

7                   THE COURT: All right. Ladies and  
8 gentlemen, now that you've heard the arguments of  
9 counsel, it becomes -- and the evidence, it becomes my  
10 duty to give you instructions as to the law applicable  
11 to this case. All of the instructions given to you by  
12 the Court, those given to you at the beginning of the  
13 trial, those given to you during the trial, and these  
14 final instructions, must guide and govern your  
15 deliberations.

16                  Now, you won't have these instructions in  
17 writing. What you will have is a tape-recording of  
18 them, if you wish to hear it. You're not required to  
19 listen to it again, but you will have that. And the  
20 reason for it is that what I have and what I use is not  
21 in a form that you would find anything other than  
22 inscrutable. So I have the tape-recording.

23                  Now, it is your duty as jurors to follow the  
24 law as stated by the Court and to apply the rules of law  
25 given to you by the Court to the facts as you find them

1                   from the evidence in the case. And counsel have quite  
2                   properly referred to some of the governing rules of law  
3                   in their arguments. But as I told you before, if any  
4                   difference appears to you between the law as stated by  
5                   counsel and the law stated by the Court in these  
6                   instructions, you must, of course, be governed by the  
7                   Court's instructions.

8                   Now, nothing I say in these instructions is  
9                   to be taken as an indication that I have an opinion  
10                  about the facts of the case or what that opinion is.  
11                  It's not my function to determine the facts. It is  
12                  yours.

13                  You're not to single out one instruction  
14                  alone as stating the law, but must consider the  
15                  instructions as a whole. And neither are you to be  
16                  concerned with the wisdom of any rule of law stated by  
17                  the Court regardless of what you -- regardless of any  
18                  opinion you may have as to what you think the law ought  
19                  to be. It would be a violation of your sworn duty as  
20                  jurors if you ignore the law as I give it to you in  
21                  these instructions and apply some other law. It would  
22                  also be a violation of your sworn duty as jurors of the  
23                  facts to base a verdict upon anything but the evidence  
24                  in the case.

25                  Now, you've been chosen as jurors for this

1 trial in order to evaluate all of the evidence received  
2 and to decide each of the factual questions presented by  
3 the allegations brought by the plaintiffs.

4 In deciding the issues presented to you for  
5 decision in this trial, you must not be persuaded by  
6 bias, prejudice, or sympathy for or against any of the  
7 parties in this case or by public opinion. You  
8 shouldn't be influenced by a person's race, color,  
9 religion, national ancestry, or sex.

10 Justice through trial by jury must always  
11 depend upon the willingness of each individual juror to  
12 seek the truth as to the facts from the evidence  
13 presented to all jurors and to arrive at a verdict by  
14 applying the same rules of law given to you by the  
15 Court.

16 Now, this case should be considered and  
17 decided by you as a case or an action between persons of  
18 equal standing in the community, of equal worth, and  
19 holding the same or particular stations of life. A  
20 corporation is entitled to the same fair trial at your  
21 hands as a private individual.

22 All persons, including corporations,  
23 partnerships, and other entities, stand equal before  
24 the law and are to be dealt with as equals in a court of  
25 justice. And when a corporation is involved, of course,

1           it may act only through natural persons as its agents or  
2       employees. And in general, any agent or employee of a  
3       corporation may bind the corporation by his or her acts  
4       and declarations made while acting within the scope of  
5       that person's employment; that is, the scope of  
6       authority delegated to him by the corporation or within  
7       the scope of his or her duties as an employee of the  
8       corporation.

9                          Now, as I told you, the burden in this case  
10      is on the plaintiffs in a civil action to prove every  
11      essential element of his or her claim by a preponderance  
12      of the evidence. If the proof should fail to establish  
13      any essential element of plaintiffs' claim by a  
14      preponderance of the evidence in the case, the jury  
15      should find for the defendant as to that claim.

16                          To establish by a preponderance of the  
17      evidence means to prove that something is more likely so  
18      than not so. In other words, a preponderance of the  
19      evidence in the case means such evidence as when  
20      considered and compared with that opposed to it has more  
21      convincing force and produces in your minds belief that  
22      what is sought to be proved is more likely true than not  
23      true. The rule does not, of course, require proof to an  
24      absolute certainty since proof to an absolute certainty  
25      is seldom possible in any case.

1                   In determining whether any fact in issue is  
2    been proven by a preponderance of the evidence, you may,  
3    unless you've been otherwise instructed, consider the  
4    testimony of all witnesses who testified regardless of  
5    who may have called them, all exhibits received into the  
6    record as evidence and -- regardless of who produced it,  
7    and all facts which may have been admitted or  
8    stipulated. There haven't been any stipulations.

9                   Now, there's nothing particularly different  
10   in the way that a juror should consider the evidence in  
11   a trial from that in which any reasonable person would  
12   treat any very important question that must be resolved  
13   by examining facts, opinions, and evidence.

14                  You're expected to use your good sense in  
15   considering and evaluating the evidence in the case for  
16   only those purposes for which it has been received and  
17   to give such evidence a reasonable and fair construction  
18   in the light of your common knowledge of the natural  
19   tendencies and inclinations of human beings. And keep  
20   constantly in mind that it would be a violation of your  
21   sworn duty to base a verdict upon anything other than  
22   the evidence received in the case and the Court's  
23   instructions.

24                  As I told you at the outset, generally  
25   speaking there are two types of evidence from which a

1                   jury may find the facts of the case: There is direct  
2                   evidence and circumstantial evidence.

3                   Direct evidence is testimony, for example,  
4                   of an eyewitness.

5                   The other is indirect or circumstantial  
6                   evidence, proof of a chain of circumstances pointing to  
7                   the existence or nonexistence of certain facts.

8                   As a general rule, the law makes no  
9                   distinction between direct and circumstantial evidence,  
10                  but simply requires that the jury find the facts in  
11                  accordance with a preponderance of all the evidence in  
12                  the case, both direct and circumstantial.

13                  Now, unless you were otherwise instructed --  
14                  and I don't recall that there was a contrary  
15                  instruction -- the evidence in the case consists of the  
16                  sworn testimony of the witnesses regardless of who  
17                  called them, all exhibits received into evidence,  
18                  regardless of who may have produced them, and all  
19                  facts -- there were no admissions or stipulations or  
20                  judicial notice, so I'm going to omit that. So the  
21                  evidence in the case is the witnesses' testimony and the  
22                  exhibits, regardless of who produced the witnesses or  
23                  the evidence.

24                  Statements and arguments of counsel, as I  
25                  told you at the outset, are not evidence in the case.

1       If a lawyer asked a witness a question that contains an  
2       assertion of fact, you may not consider the assertion as  
3       evidence of that fact. The lawyers' statements are not  
4       evidence. Only the answers are evidence.

5                     The lawyers, from time to time, may have  
6       referred to certain facts that came out in the evidence.  
7       And as I've previously told you, if any -- if your  
8       recollection of the facts is different from that of the  
9       lawyers', your recollection controls because you're the  
10      sole judges of the facts.

11                  Any evidence as to which an objection was  
12       sustained by the Court and any evidence ordered stricken  
13       by the Court must be entirely disregarded. And  
14       anything, of course, that you may have seen or read or  
15       heard outside the courtroom is not evidence and must be  
16       disregarded.

17                  You're to consider only the evidence in the  
18       case. But in your consideration of the evidence, you're  
19       not limited to do the bald statements of the witnesses.  
20       You're not limited to the bald statements of the  
21       witnesses. You're not limited solely to what you see  
22       and hear as the witnesses testify. You're are permitted  
23       to draw from the facts that you find have been proven  
24       such reasonable inferences as you feel are justified in  
25       light of your experience and common sense. Inferences

1       are simply deductions or conclusions that reason and  
2       common sense lead the jury to draw from the evidence  
3       received in the case.

4                  Now, as I told you at the outset, with  
5       respect to all forms of evidence properly considered by  
6       you, you, as the jurors, are the sole judges of the  
7       credibility of the witnesses and the evidence and the  
8       weight their testimony deserves. You may be guided by  
9       the witness's appearance and conduct or by the manner in  
10      which the witness testifies or by the character of the  
11      testimony given or by evidence to the contrary of the  
12      testimony given.

13                 You should carefully examine all the  
14      testimony given, the circumstances under which each  
15      witness has testified, and every matter in evidence that  
16      tends to show whether a witness is worthy of belief.  
17      Consider each witness's intelligence, motive, and state  
18      of mind and demeanor and manner while on the stand.  
19      Consider the witness's ability to observe the matters as  
20      to which he or she testified and whether he or she  
21      impresses you as having an accurate recollection of the  
22      matters. Consider also any relation each witness may  
23      bear to either side of the case, the matter in which  
24      each witness might be biased or affected by the verdict,  
25      and the extent to which, if at all, each witness is

1 either supported or contradicted by other evidence in  
2 the case.

3 Now, inconsistencies and discrepancies in  
4 the testimony of a witness or between the testimony of  
5 different witnesses may or may not cause you to  
6 discredit such testimony. Two or more persons  
7 witnessing an incident or a transaction may simply see  
8 or hear it differently. An innocent misrecollection,  
9 like failure of recollection, is not an uncommon  
10 experience.

11 As I get older, that becomes truer and  
12 truer.

13 In weighing the effect of the discrepancy,  
14 always consider whether it pertains to a matter of  
15 importance or an unimportant detail and whether the  
16 discrepancy results from innocent error or intentional  
17 falsehood. And after making your own judgment, you will  
18 give the testimony of each witness the weight you think  
19 it deserves. And in short, you may accept or reject the  
20 testimony of any witness in whole or in part.

21 Now, a witness may be discredited or  
22 impeached by contradictory evidence or by evidence that  
23 at some other time the witness has said or done  
24 something or has failed to say or do something that is  
25 inconsistent with the witness's present testimony.

1                   If you believe any witness has been  
2 impeached and thus discredited, it is your exclusive  
3 province to give the testimony of that witness such  
4 credibility, if any, as you think it deserves.

5                   If a witness has shown knowingly to have  
6 testified falsely concerning any material matter, you  
7 have the right to distrust such witness's testimony in  
8 other particulars. And you may reject all the testimony  
9 of that witness or give it such credibility as you think  
10 it deserves. And an act or omission in this regard is  
11 knowingly done if done voluntarily and intentionally and  
12 not because of mistake, accident, or other innocent  
13 reason.

14                  Now, the weight of the evidence in this case  
15 is not necessarily determined by the number of witnesses  
16 testifying as to the existence or nonexistence of a  
17 fact. You may find that the testimony of a smaller  
18 number of witnesses as to any fact is more credible than  
19 the testimony of a larger number of witnesses to the  
20 contrary.

21                  Also, the law doesn't require any party to  
22 call as witnesses all persons who may have been present  
23 at any time or place involved in the case or who may  
24 appear to have some knowledge of the matters in issue in  
25 this trial, nor does the law require any party to

1 produce as exhibits all papers and things mentioned in  
2 the evidence in this case.

3 Now, the Rules of Evidence ordinarily do not  
4 permit witnesses to testify as to their own opinion or  
5 their own conclusions about issues in the case. An  
6 exception to this rule exists as to those witnesses who  
7 are described as expert witnesses. An expert witness is  
8 someone who, by education or by experience, may have  
9 become knowledgeable in some technical, scientific, or  
10 very specialized area. Such knowledge or experience may  
11 be of assistance to you in understanding some of the  
12 evidence or in determining a fact. An expert witness in  
13 that area may state an opinion as to relevant and  
14 material matters in which he claims to be an expert.

15 You should consider the expert opinion  
16 received in evidence in this case -- there was one  
17 expert -- and give each opinion such weight as you may  
18 think it deserves. You should consider the testimony of  
19 an expert witness just as you consider the testimony of  
20 any other witness.

21 If you should decide that the opinion of an  
22 expert witness is not based on sufficient education or  
23 experience or if you conclude that the reasons given in  
24 support of the opinion are not sound or if you should  
25 conclude that the opinion is outweighed by other

1 evidence in the case, you may disregard the opinion in  
2 part or in its entirety. As I've told you several  
3 times, you the jury are the sole judges of the facts in  
4 this case.

5 Now, as you heard, a language other than  
6 English was used during the trial, and an interpreter  
7 was used. You are to consider that evidence provided  
8 through the official interpreter. Although some of you  
9 may know the non-English language -- Czech in this  
10 case -- used, it is important that all jurors consider  
11 the same evidence. Therefore, you must base your  
12 decision on the evidence presented in the English  
13 interpretation by the interpreter. You must ignore any  
14 different meaning of the non-English words.

15 I simply assumed that nobody here spoke  
16 Czech.

17 THE JUROR: I understand some.

18 THE COURT: I beg your pardon?

19 THE JUROR: I said I understand some.

20 THE COURT: But you've understood, then, the  
21 instruction that you're --

22 THE JUROR: Yes, sir.

23 THE COURT: In fact, I couldn't always hear  
24 the Czech answers anyway.

25 Now, during the course of the trial, I

1       occasionally asked questions of a witness. Do not  
2       assume that I hold any opinion on the matters to which  
3       my questions may have related. The Court asked  
4       questions to clarify matters, not to help one side or  
5       hurt another. Remember at all times you as jurors, as  
6       I've said several times, are the sole judges of the  
7       facts. And it's the duty of the Court to admonish  
8       attorneys who out of zeal for the cause of his or her  
9       client, does something which is not in keeping with the  
10      Rules of Evidence or procedure. You're to draw no  
11      inference against the side to whom an admonition of the  
12      Court was addressed during the trial of this case.

13                   And as I've told you several times now --  
14      I'll simply repeat it -- if any reference by the Court  
15      or by counsel to matters of testimony or exhibits  
16      doesn't coincide with your own recollection of that  
17      evidence, it is your recollection that must control  
18      during your deliberations and not the statements of  
19      Court or counsel.

20                   Now, this case involves two contracts: The  
21      employment contract and its addendum and the lease  
22      between Plaintiffs Roberts and David Donnert and  
23      Defendant Feld Entertainment.

24                   Plaintiffs contend that these contacts were  
25      breached when the employment contract was terminated by

1 defendant without cause. Defendant denies that the  
2 contracts were breached and instead contends that the  
3 plaintiffs were terminated for cause.

4 Specifically, defendant contends that under  
5 the employment contract and addendum and the lease,  
6 defendant -- no. Specifically, the defendant contends  
7 that under the employment contract and addendum, that  
8 the defendant had the sole control of the show's  
9 artistic content, production, direction, and that  
10 plaintiffs' contracts were terminated when they refused  
11 to perform as directed.

12 Plaintiffs contend that the change in the  
13 order of the show prevented plaintiffs from performing  
14 the contracts.

15 Defendant denies that the change in the  
16 order of the show prevented plaintiffs' performance and  
17 contends that it provided plaintiffs option to continue  
18 performing under the contract.

19 The parties don't dispute that the two  
20 contracts, the lease which includes the addendum and the  
21 employment contract and addendum -- the lease,  
22 employment contract, and addendum, no one disputes that  
23 they're valid contracts between the parties.

24 The dispute in this case focuses on two  
25 issues: Did the defendant by terminating plaintiffs

1                   breach the contracts between the parties? And, if so,  
2                   what is the amount of plaintiffs' damages? On these  
3                   issues, the plaintiffs have the burden of proof.

4                   Both parties to a contract have a duty of  
5                   good faith and fair dealing to act as they promised.  
6                   Such a duty of good faith and fair dealing is implied in  
7                   every contract. Each contracting party is entitled to  
8                   assume that the other party intends to perform the  
9                   contract in good faith.

10                  But the duty of good faith and fair dealing  
11                  does not add any duties to the contract not already  
12                  contained within the terms of the contract, nor does it  
13                  change or subtract any duties from the contract. It is  
14                  simply a duty to act in good faith according to the  
15                  terms of the contract.

16                  A breach of the contract occurs if a party  
17                  fails to do something which that party is bound to do  
18                  according to the contract and which is so important and  
19                  central to the contract that the failure to -- failure  
20                  defeats the very purpose of the contract.

21                  A party to a contract who prevents the other  
22                  party from performing its obligations under a contract  
23                  has breached the contract.

24                  Let me have the parties at the bench very  
25                  quickly.

**1** (Sidebar.)

THE COURT: I omitted to mention this in my review with the parties on this particular instruction. It seems to me a fair instruction would say that a party to a contract who prevents the other party from performing its obligations under a contract has breached the contract. However, a party does not breach a contract if the party is exercising a right that party has under the contract. That was what my intention was. That would accord with the argument you made and the case you cited.

**12** Any objection to my telling them that?

**13** ATTORNEY PIERCE: No.

**14** THE COURT: All right. I will do so.

**15** | (End of sidebar.)

**16** THE COURT: Let me repeat that instruction.

**17** THE REPORTER: Excuse me.

**18** THE COURT: This is not a typical reporter.

19 He's reported in world championships all over the world  
20 and has placed as high as third or fourth.

Is that correct?

**22** THE REPORTER: That is correct.

**23** THE COURT: He goes all over the world.

**24** Last time, I think he was in Thailand or Switzerland.

**25** At least that's what he tells me.

1                   Let me repeat that last instruction for  
2 clarification.

3                   A party to a contract who prevents the other  
4 party from performing his obligations under a contract  
5 has breached the contract. But a party does not breach  
6 the contract if the party exercises a right it has under  
7 the contract.

8                   If you find that plaintiffs prove that  
9 defendant breached the employment contract, it follows  
10 that defendant also breached the lease. If, on the  
11 other hand, you find that the plaintiffs did not prove  
12 that defendant breached the employment contract, it  
13 follows that defendant did not breach the lease.

14                  In other words, if there's no breach of the  
15 lease, there's no breach of the employment contract. If  
16 there is a breach of the lease or the employment -- you  
17 can't breach one without breaching the other. And if  
18 you don't find a breach of either, you can't find a  
19 breach of the other.

20                  Any objection to that, Mr. Pierce?

21                  ATTORNEY PIERCE: None other than what we've  
22 discussed before.

23                  THE COURT: All right. Mr. Porter?

24                  ATTORNEY PORTER: No, sir.

25                  THE COURT: Now, there is a ruling that I

1 have made. Paragraph 15 of the lease agreement states  
2 that, "This lease shall not be construed to create a  
3 partnership or joint venture between lessee," that's the  
4 defendant here, "and lessor," that's the plaintiff here.  
5 "And for purposes of this lease, the parties are  
6 independent contractors. Lessors have the sole  
7 responsibility to -- and control the manner, means, and  
8 sequence of performing the services related to this  
9 lease."

10 Now, I've ruled that the provision of the  
11 lease -- this provision of the lease does not give the  
12 plaintiffs control over the production or direction of  
13 the show, including the show's sequence, order, or  
14 artistic content.

15 Instead, the provision provides the  
16 plaintiffs have sole responsibility and control over the  
17 manner, means, and sequence of performing the lease  
18 services, which include animal husbandry, care, daily  
19 upkeep, and transportation for the plaintiffs' horses.

20 If you find your verdict for the plaintiffs,  
21 then they're entitled to recover as damages all of the  
22 losses they sustained that are a natural and ordinary  
23 result of the breach that they have proved by the  
24 greater weight of the evidence.

25 The burden is on the plaintiffs to prove by

1       the greater weight of the evidence that they sustained  
2       each item of damage they claim. They're not required to  
3       prove the exact amount of the damages, but they must  
4       show sufficient facts and circumstances to permit you to  
5       make a reasonable estimate of them. If the plaintiffs  
6       fail to do so, they cannot recover for that item.

7                     The plaintiffs have a duty to minimize --  
8       minimize or mitigate their damages. If you find that  
9       the plaintiffs did not act reasonably to mitigate or  
10      minimize their damages and that as a result the damages  
11      were greater than if they had acted to mitigate them,  
12      then plaintiffs cannot recover the amount by which the  
13      damages were increased. If plaintiffs did act to  
14      minimize or mitigate their damages, the amount  
15      plaintiffs received as a result of their attempts to  
16      mitigate must not be awarded as damages.

17                   The burden is on defendant to prove by the  
18      greater weight of the evidence that the plaintiffs  
19      failed to minimize their damages and to prove by the  
20      greater weight of the evidence the amount by which the  
21      damages were increased as a result. The duty to  
22      minimize is required only when it can be performed with  
23      minor expense. Where only a breach of contract and no  
24      actual damage has been proved, nominal damages may be  
25      recovered.

1                   Now, the fact that I've instructed you as to  
2                   the proper measure of damages should not be taken or  
3                   considered by you as indicating any view of mine as to  
4                   which party is entitled to your verdict in this case.

5                   Instructions as to the measure of damages  
6                   are given for your guidance only in the event that you  
7                   should find in favor of the plaintiffs from a  
8                   preponderance of the evidence in this case in accordance  
9                   with all of the other instructions given to you.

10                  Now, you must not base your verdict, as I've  
11                  said earlier, upon sympathy, bias, guesswork, or  
12                  speculation. Your verdict must be based solely on the  
13                  evidence and the Court's instructions.

14                  The verdict must represent the considered  
15                  judgment of each juror. In order to return a verdict,  
16                  therefore, each juror must agree thereto. In other  
17                  words, your verdict must be unanimous.

18                  It is your duty as jurors to consult with  
19                  one another and to deliberate with a view to reaching an  
20                  agreement if you can do so without violence to your  
21                  individual judgment. You must each decide the case for  
22                  yourself, but do so only after an impartial  
23                  consideration of all the evidence in the case with your  
24                  fellow jurors.

25                  And in the course of your deliberations, do

1       not hesitate to reexamine your own views and to change  
2       your opinion if convinced it's erroneous. But do not  
3       surrender your honest conviction as to the weight or  
4       effect of the evidence solely because of the opinion of  
5       your fellow jurors or for the mere purpose of returning  
6       a verdict. Remember at all times you are not partisans.  
7       You are judges, judges of the facts of the case. And  
8       your sole interest is to seek the truth from the  
9       evidence in the case.

10                  Now, during your deliberations, you must not  
11       communicate or provide any information to anyone by any  
12       means about this case. You may not use any electronic  
13       device or media such as -- and here is the long list.  
14       I'm not going to go through it unless there's an  
15       objection -- cell phones, smart phones, any electronic  
16       device or means, Facebook. I don't even know what some  
17       of these things are. LinkedIn and the like. Don't do  
18       any of that. Don't conduct any research about this case  
19       until I have your verdict. Even afterwards, if you look  
20       for me on Facebook, you will be disappointed, I hope.

21                  Now, when you retire to the jury room,  
22       you'll select one of your number to act as your  
23       foreperson. The foreperson will preside over your  
24       deliberations and will be your spokesperson here in  
25       court.

1                   A form of the verdict has been prepared for  
2 your convenience, and I will review that with you now.

3                   May I have a copy of that, please.

4                   The verdict is a two-page document. At the  
5 top of the first page is the style of the case; that is,  
6 the name of the case. And beneath that it says,  
7 "Verdict Form." And then there's a question. It  
8 states, "Do you find that plaintiffs have proved by a  
9 preponderance of the evidence that defendant breached  
10 the employment contract, the addendum to the employment  
11 contract, and/or the lease?" It says "and the lease."  
12 But if there's a breach of any of them, there's a breach  
13 of all of them.

14                  And then you have an opportunity to say,  
15 yes, the plaintiff has proved that by a preponderance  
16 or, no, the plaintiff hasn't.

17                  If your answer to Question 1 is no, then  
18 you're done. Complete -- sign the form, and you're  
19 done. You don't have to answer Question 2, which  
20 relates to damages.

21                  If your answer is yes, you must answer  
22 Question 2, which is, "What amount of damages, if any,  
23 has Plaintiff David Donnert proved by a preponderance of  
24 the evidence was caused by defendant's breach of the  
25 employment contract, and what amount of damages, if any,

1 has David Donnert proved by a preponderance of the  
2 evidence was caused by defendant's breach of the lease?"  
3 Then the same two questions are asked with respect to  
4 Robert Donnert.

5 And after that, there's a place for you to  
6 fill in the foreperson's printed name, a signature, and  
7 a date. And when you have -- you'll take this form  
8 with you into the jury room. It will be provided by  
9 Mr. Wood.

10 And when you have reached your unanimous  
11 agreement as to your verdict, you'll have the foreperson  
12 fill it in, date it, and sign it setting forth the  
13 verdict on which you unanimously agreed, and then return  
14 with your verdict to the courtroom.

15 Now, it's proper to add the caution that  
16 nothing in these instructions and nothing in any form of  
17 the verdict prepared for your convenience is meant to  
18 suggest or to convey in any way or any manner what  
19 verdict I think you should reach. What the verdict  
20 shall be, as I told you at the outset, is your sole and  
21 exclusive duty and responsibility.

22 Now, if it becomes necessary during your  
23 deliberations to communicate with the Court, you may  
24 send a note signed by the foreperson or by one or more  
25 of you. And put the date and the time by it.

1                   No member of the jury should ever attempt to  
2 communicate with the Court by any means other than a  
3 signed writing, and this Court will never communicate  
4 with any member of the jury on any subject touching on  
5 the merits of the case otherwise than in writing or  
6 orally here in open court.

7                   I may communicate with you on administrative  
8 matters like how much longer you wish to deliberate or  
9 anything of that sort. I'll do that through Mr. Wood.  
10 With respect to the merits of the case, I won't  
11 communicate with you other than in writing or orally  
12 here in open court.

13                   And you'll note from the oath about to be  
14 taken by Mr. Wood, the court security officer, that he,  
15 too, as well as all other persons, are forbidden to  
16 communicate in any manner with any member of the jury on  
17 any subject touching the merits of the case. And bear  
18 in mind, also, that you're never to reveal, not even to  
19 the Court, how the jury stands numerically or otherwise  
20 on the questions before you until after you have reached  
21 your unanimous verdict.

22                   You may administer the oath to Mr. Wood.

23                   (Marshal sworn by clerk.)

24                   THE COURT: Now, I'm going to release you so  
25 that you may begin your deliberations. Now you won't

1       hear the familiar litany about refraining from  
2       discussing the matter, because now is the time when you  
3       must do precisely that.

4                     But don't do it just yet. Once I release  
5       you and you go into the room -- keep your books, because  
6       now you'll need to keep them. It will take a few  
7       minutes for Mr. Wood to collect the tape recorder, the  
8       verdict form, the exhibits, and bring them in to you.

9                     In addition, also a computer will be brought  
10      in.

11                  And I don't see Mr. Bachman.

12                  You can show them, can't you, Bill?

13                  THE MARSHAL: Yes.

14                  THE COURT: Mr. Wood will show you how to  
15       operate this machine. If you want -- we're going to  
16       bring in exhibits. You're not required to look at every  
17       exhibit or any exhibit. You're not required to view  
18       these videos. But you may if you wish to. They're on  
19       there, and I think there's an index.

20                  Is there not on this, Mr. Pierce,  
21       Mr. Porter?

22                  ATTORNEY PORTER: There is, sir.

23                  THE COURT: All right. So you can -- it  
24       sounds like I know what I'm saying, but I really don't.  
25       Click on it. I'm not a computer person, as you may have

1 gathered. And you will be able to see the video if you  
2 wish to. You're not required to. And you may  
3 deliberate as long or as little as you'd like.

4 But don't begin the process of deliberation  
5 until Mr. Wood has brought in all of the exhibits, the  
6 verdict form, the tape recorder, and this computer. And  
7 once he has brought all of that in and perhaps shown you  
8 how to access the video clips, once he's done that and  
9 left and the door closes, you may then begin your  
10 deliberations.

11 Let me have counsel very quickly one final  
12 time at the bench.

13 (Sidebar.)

14 THE COURT: Apart from the objections  
15 preserved in the instruction conference, has the jury  
16 been fully and fairly instructed?

17 ATTORNEY PIERCE: They have.

18 ATTORNEY PORTER: Yes, sir.

19 THE COURT: Now, does either party wish the  
20 alternate to be stricken?

21 ATTORNEY PIERCE: No.

22 ATTORNEY PORTER: No, sir.

23 THE COURT: We'll proceed. Thank you.

24 (End of sidebar.)

25 THE COURT: Now, ladies and gentlemen, you

1 may go into the jury room, and we'll start the process  
2 of getting everything in to you as quickly as possible.

3 Mr. Wood, do we also have soft drinks in the  
4 fridge back there?

5 THE MARSHAL: Yes, sir.

6 THE COURT: So you may want to use the time  
7 to get a soft drink or something. Remember, you may not  
8 deliberate, that is, you may not discuss the matter  
9 among yourselves, unless the door is closed and all  
10 seven of you are there. In one of you has to use the  
11 facilities, you must cease talking about the case until  
12 all seven of you are present. You may deliberate as  
13 long or as little as you wish. It's entirely up to you.

14 You may follow Mr. Wood out.

15 (Jury excused to deliberate at 3:59 p.m.)

16 THE COURT: Now, I want counsel to go back  
17 to counsel table to ensure that there's agreement that  
18 the proper exhibits are going back.

19 (Pause in proceedings.)

20 THE COURT: The index is just of the  
21 exhibits that have been admitted; is that correct?

22 ATTORNEY PORTER: On the video?

23 THE COURT: Yes.

24 ATTORNEY PORTER: Yes, sir.

25 THE COURT: All right. Then I'm going to

1           recess. Again, if there's any dispute about what's  
2           going to be taken back and given to the jury, you may  
3           advise Mr. Wood. And I'll return and deal with any  
4           dispute. But if you'll deal with the deputy clerk so  
5           that we can get the exhibits back there as promptly as  
6           possible -- you may be seated -- and we'll proceed. And  
7           I'll figure out later -- I'll inquire of the jury how  
8           long they wish to deliberate. I don't know whether  
9           they'll reach a decision today or whether it will extend  
10          into tomorrow. I just don't know.

11                 Anything further at this time, Mr. Pierce,  
12          Mr. Porter?

13                 ATTORNEY PORTER: No, sir.

14                 ATTORNEY PIERCE: No.

15                 THE COURT: Ms. Proctor?

16                 ATTORNEY PROCTOR: No, your Honor.

17                 THE COURT: Court stands in recess.

18                 (Court recessed at 4 o'clock.)

19                 (Court called to order at 5:40 p.m.)

20                 THE COURT: I have a question from the jury.  
21                 I'll read it to you, then I'll have Mr. Wood, the court  
22                 security officer, show it to counsel at the podium. You  
23                 may each look at it.

24                 It says, "(After being fired) what replaced  
25                 the (juggling/horse act) act in the center ring? Did it

1 include animals, also?" signed David Link, 5:35 p.m.  
2 Eastern Standard Time.

3 I thought it was Daylight Saving.

4 ATTORNEY PORTER: I think it is.

5 THE COURT: What's EST?

6 ATTORNEY PORTER: Eastern Standard Time.

7 THE COURT: 11/14/13.

8 All right. Mr. Wood, let counsel read this,  
9 and then I'll tell you what answer I propose to give and  
10 then let you indicate whether you have any objection to  
11 that answer.

12 (Counsel conferring.)

13 THE COURT: All right. Here's the answer  
14 that I intend to give: I will tell the jury in response  
15 to this question after reading it -- I will say, "You  
16 must decide the case on the basis of the evidence  
17 presented. Now, in that regard, I will tell you that  
18 the parties in this case, after the filing of this case,  
19 engaged in a period of discovery where they had an  
20 opportunity to ask each other whatever might be relevant  
21 to the case. And then the parties make their own  
22 determination as to what evidence they wished to offer,  
23 what they considered to be relevant. And you must  
24 decide the case on the basis of the evidence as it was  
25 presented."

1 Any objection, Mr. Pierce?

2 ATTORNEY PIERCE: No, your Honor.

3 THE COURT: Mr. Porter?

4 ATTORNEY PORTER: No, sir.

5 THE COURT: Have the jury brought in,  
6 please.

7 (Jury impaneled at 5:43 p.m.)

8 THE COURT: All right. You may be seated.

9 Ladies and gentlemen, I have a note from you  
10 posing a question. I will read the note, and then I  
11 will provide you with the answer orally.

12 " (After being fired) what replaced the  
13 (juggling/horse act) act in the center ring? Did it  
14 include animals, also?" signed David Link, 5:35 p.m.  
15 EST --

16 By the way, I think it's EDST:

17 -- "EST, 11/14/13."

18 The answer is as follows: You must decide  
19 the case on the evidence presented. Now, I will tell  
20 you that after the case was filed, the parties had an  
21 opportunity for a period of time to engage in discovery  
22 where they were able to ask -- each party asked the  
23 other party questions and obtained information, and then  
24 the parties decide what evidence they wish to present at  
25 trial. In other words, they make determinations as to

1 what evidence they think is relevant for the trial. And  
2 now you must decide the case based on that evidence.

3 All right. I thank you. You may return and  
4 continue your deliberations.

5 (Jury excused to deliberate at 5:45 p.m.)

6 THE COURT: And I'll have the note made a  
7 part of the record.

8 THE CLERK: Yes, your Honor.

9 THE COURT: All right. Court stands in  
10 recess.

11 (Court called to order at 6:35 p.m.)

12 THE COURT: All right. The jury wishes to  
13 return tomorrow. So I'm going to instruct them in that  
14 regard.

15 Have the jury brought in, please.

16 (Jury impaneled at 6:33 p.m.)

17 THE COURT: All right. You may be seated.

18 Ladies and gentlemen, I'm advised that you  
19 wish to return tomorrow. So I'm going to excuse you  
20 this evening.

21 Now, when you get home again, you will have  
22 to resist the temptation to discuss this matter with  
23 anyone. Don't allow anybody to speak to you about it.  
24 Don't you speak to anybody. Don't do anything on  
25 telephones or more sophisticated equipment. Don't do

1 anything at all in terms of investigating this case.

2 Don't look up anything in books or anything else. Put  
3 the matter out of your mind, and I'll see you tomorrow  
4 morning at 9:30. And I'll reconvene you.

5 There will be other matters going on in the  
6 courtroom, but I'll make time to reconvene you. We'll  
7 take the roll, and then permit you to continue and  
8 deliberate on your verdict in there. There will be  
9 other matters going on in the courtroom.

10 All right. You may follow the court  
11 security officer out. All of the matters in the jury  
12 room will be locked up. Mr. Wood will take care of  
13 that.

14 (Jury excused at 6:35 p.m.)

15 THE COURT: All right. This matter is  
16 recessed until tomorrow at 9:30.

17 (Court adjourned at 6:35 p.m.)

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1 CERTIFICATE  
2

3 I, MICHAEL A. RODRIQUEZ, an Official Court  
4 Reporter for the United States District Court, in the  
5 Eastern District of Virginia, Alexandria Division, do  
6 hereby certify that I reported by machine shorthand, in  
7 my official capacity, the trial proceedings had in the  
8 case of ROBERT DONNERT, et al., v. FELD ENTERTAINMENT,  
9 INCORPORATED.

10

11 I further certify that I was authorized and  
12 did report by stenotype the trial proceedings in said  
13 case, and that the foregoing pages, numbered 1 to 198,  
14 inclusive, constitute the official transcript of said  
15 proceedings as taken from my machine shorthand notes.

16

17 IN WITNESS WHEREOF, I have hereto subscribed  
18 my name this 13th day of March, 2013.

19

20

21

/S/

22 \_\_\_\_\_  
Michael A. Rodriquez, RPR/CM/RMR  
23 Official Court Reporter

24

25